TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, ~~1904~~ 1905.

No. ~~954~~ 85.

THE RUSSIAN AMERICAN PACKING COMPANY, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED AUGUST 22, 1904.

(19,451.)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 351.

THE RUSSIAN AMERICAN PACKING COMPANY, APPELLANT,

vs.

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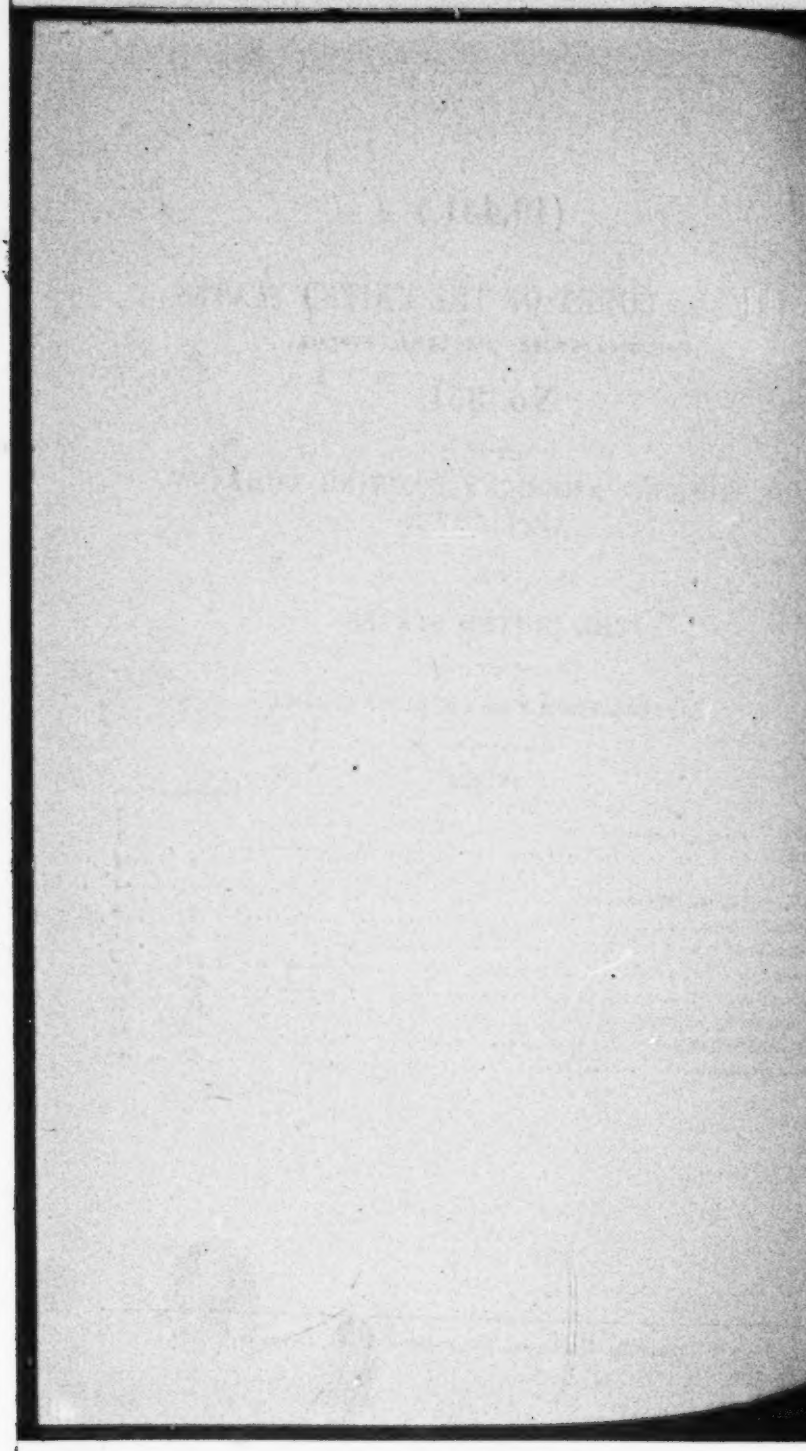

1 Court of Claims.

THE RUSSIAN-AMERICAN PACKING COMPANY (a Corporation)
vs.
THE UNITED STATES. } No. 20758.

I.—*Petition. Filed April* 14, 1897.

To the honorable the judges of the Court of Claims:

The petition of the Russian American Packing Company respectfully represents:

1. That The Russian American Packing Company, the claimant herein, is a corporation duly incorporated under and by virtue of the laws of the State of California, and that as such corporation your petitioner was privileged to acquire and hold lands and operate various franchises in the State of California and in the Territories of Washington and Alaska in the United States.

2. That after the incorporation of this company, to wit, in April, 1889, your petitioner entered upon a certain tract of land in Alaska, the same being on Afognak island on the north shore of Afognak bay, containing a certain number of acres, to wit, one hundred and fifty-nine and fifty-two one hundredths (159.52) acres and began immediately to make improvements thereon.

3. That at the date of the passage of the act of Congress, entitled "An act to repeal the timber culture laws, and for other pur-
2 poses," approved March 3, 1891 (26 Statute at Large, 1100), which provided, among other things, that—

"Any citizen of the United States twenty-one years of age now or hereafter in possession of and occupying public lands in Alaska for the purpose of trade or manufactures, may purchase not exceeding one hundred and sixty acres, to be taken as near as practicable in a square form, of such land, at two dollars and fifty cents per acre: Provided, that in case more than one person, association, or corporation shall claim the same tract of land, the person, association, or corporation having the prior claim by reason of possession and continued occupation shall be entitled to purchase the same; but the entry of no person, association, or corporation shall include improvements made by or in possession of another prior to the passage of this act,"

your petitioner was still, and had been continuously from the month of April, in the year 1889, in possession of and occupying said tract of land for the purpose of trade and manufactures, and had made improvements thereon of the value of thirty-one thousand ($31,000) dollars. That on the first day of April, 1892, pursuant to

and in accordance with the provisions of said act and the regulations adopted by the Secretary of the Interior, your petitioner made application, under oath, to the United States marshal and *ex-officio* surveyor general of Alaska, for estimates of the sums required to be deposited for field and office work in the making of a survey of said tract; that in response to said application your petitioner was notified by the officer aforesaid, that the sum of one hundred and thirty-five ($135.00) dollars would be required for said purpose; that thereupon petitioner deposited said sum in the United States depository in San Francisco in accordance with section twenty-four hundred and one (2401) of the Revised Statutes, for which sum certificates
3 were duly issued; that said certificates were thereafter received by said marshal and *ex-officio* surveyor general, who caused a correct survey of said tract to be made in accordance with the regulations adopted by the Secretary of the Interior, the field notes, maps, and plats of this survey, which was known as survey number thirty-one (31), were duly returned to the proper office, approved by said marshal and *ex-officio* surveyor general, and certified copies of the same forwarded to the General Land Office; that thereupon your petitioner made said application for the purpose of purchasing said land under said statute.

4. That between the third of March, in the year 1891, and the twenty-fourth of December, in the year 1892, your petitioner made, upon said tract, improvements of the value of thirty-one thousand ($31,000) dollars in addition to those hereinbefore mentioned.

5. That on the third of March, in the year 1891, and up to and until the twenty-fourth of December, in the year 1892, the tract of land aforesaid had not been selected by the United States commissioner of fish and fisheries for the purpose of establishing fish culture stations.

6. That on the twenty-fourth of December, in the year 1892, the President of the United States, by virtue of said act of the third of March, in the year 1891, and other laws of the United States, issued a proclamation which declared, among other things, that the whole island of Afognak, including the property of your petitioner, was reserved for public purposes.

7. That, by the same proclamation, warning was expressly given to all persons, including your petitioner—

"Not to enter upon or occupy the tracts of land or waters reserved by this proclamation, or to fish in or to use any of the waters herein described or mentioned; and that all such persons or corporations now occupying said island or any of said premises, except under said treaty, to wit, the treaty of cession of the Russian possessions in North America to the United States concluded on the 30th of March in the year 1867, shall depart therefrom."

4 8. That at the date of said proclamation and reservation, your petitioner was and had been continuously from the times before mentioned, to wit, since the month of April, in the year 1889, in the actual and exclusive use, occupation and possession of

said tract of land and improvements; and that your petitioner did not occupy the same under or by virtue of the treaty mentioned in said proclamation, and accordingly, in obedience to the mandate of the Government, as expressed in the above-mentioned proclamation, departed therefrom.

9. That on or about the 15th of January, in the year 1895, the Commissioner of the General Land Office rejected and disapproved the aforesaid survey and application of your petitioner, because and on account of the reservation made as aforesaid.

10. That the act of the 17th of May, in the year 1894, was in the nature of a contract by the United States with your petitioner, that it should not be disturbed in its possession, and should be allowed to acquire title to said tract of land; that, relying upon said contract, your petitioner made improvements and built up and had upon said tract, on the third of March, in the year 1891, and the twenty-fourth of December, in the year 1892, an extensive and increasing trade and business; that on the dates aforesaid the trade and business of your petitioner was reasonably worth the sum of one hundred thousand ($100,000) dollars; that by reason of the breach of said contract by the United States, the trade and business aforesaid was entirely lost and ruined to your petitioner, whereby your petitioner suffered damage to the full extent of the value of the said business.

11. That your petitioner has never been paid for any of said improvements or for any portion of said damage by it sustained; nor has its deposit of four hundred and thirty-three ($433) dollars for the surveying of this tract, or any part thereof, ever been returned to it; wherefore and by reason of the aforesaid acts of the Government, the property of your petitioner has been taken by the United States for public purposes without just compensation, contrary to the provisions of the Constitution, the law of the land, and there is now justly due and owing to your petitioner, on account thereof the sum of one hundred and forty-four thousand three hundred and sixty-nine dollars and ninety-six cents ($144,369.96).

Wherefore your petitioner prays judgment against the United States of America for the sum of one hundred and forty-four thousand three hundred and sixty-nine dollars and ninety-six cents ($144,369.96).

RUSSIAN AMERICAN PACKING COMPANY (A CORPORATION),

[SEAL.] By S. F. WEEKS, *Secretary.*

WEBB, WEBB & LINDSLEY,
Attorneys for Claimant, National Union Building, No. 918 F St. N. W., Washington, D. C.

I do solemnly swear that I have read the foregoing petition by me subscribed and know the contents thereof; that the facts therein

stated upon my personal knowledge are true, and those stated upon information and belief, I believe to be true.

S. F. WEEKS.

Subscribed and sworn to before me this 31st day of March, A. D. 1897.

F. D. MONCKTON,
Commissioner U. S. Circuit Court, Northern District of California, & Clerk U. S. Circuit Court of Appeals, Ninth District.

6 II.—*Traverse. Filed April* [redacted] 1904.

In the Court of Claims of the United States, December Term, A. D. 1903.

THE RUSSIAN AMERICAN PACKING CO.
vs.
THE UNITED STATES. } No. 20758.

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

L. A. PRADT,
Assistant Attorney General.

III.—*Argument and Submission.*

This cause was argued and submitted on the 26th day of April, 1904.

7 IV.—*Findings of Fact and Conclusions of Law. Filed May 16, 1904.*

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

Findings of Fact.

I.

The claimant herein, a corporation, was incorporated under the laws of the State of California in the year 1889, for the purpose of carrying on the business of packing salmon on the island of Afognak,

in the Territory of Alaska, and as such corporation in the spring of 1889 purchased and shipped to said island materials for the erection of a cannery and buildings for the purpose of canning salmon, and for that purpose, and without authority or license from the United States—other than whatever right it may have had under the act of May 17, 1884 (23 Stats. L., 24)—took possession of a site on said island containing about 159.52 acres of land, well covered with timber, from which the trees were cleared, and there was erected thereon a cannery, buildings, machinery, boats, and lighters for the purpose aforesaid, at a cost of $45,000, prior to which time no person or corporation had been in possession of said ground.

The claimant was, and had been continuously since taking possession of said ground for the purpose aforesaid, occupying and using the same, and was in possession thereof at the date of the passage of the act of March 3, 1891.

II.

On April 1, 1892, the claimant made application to the United States marshal and *ex officio* surveyor-general of Alaska for
8 the survey of said tract so entered upon under the provisions of said act of March 3, 1891, and in response to the notification of said officer deposited in the United States subtreasury at San Francisco, $433.80, said sum being the estimated cost of such survey. Thereupon said marshal and *ex officio* surveyor-general caused a survey of the ground so entered upon to be made, which he numbered 31, approved the same March 15, 1893, and forwarded to the Commissioner of the General Land Office for his action.

III.

After the passage of said act of March 3, 1891, and until December 24, 1892, the claimant continued to occupy said tract of land and to carry on its canning business and to keep its plant in repair. What improvements, if any, were made on said lands subsequent to the passage of the act of March 3, 1891, does not appear. Prior to December 24, 1892, the ground so used and occupied by the claimant had not been reserved by the United States for fish culture or any other purpose, nor had the same been purchased, entered, or applied for by any other person or corporation than the claimant. Said land was not mineral in character.

IV.

On December 24, 1892, the President of the United States issued a proclamation declaring the whole island of Afognak, including the site so entered upon, occupied, and improved by the claimant, reserved for the purpose of establishing thereon United States fish-culture stations, and warning all persons to depart therefrom. In July, 1893, the agents of the United States for protection of salmon

fisheries informed the agents of claimant on said island of said proclamation and ordered claimant company to depart therefrom, which it did, leaving its property thereon, and has not since returned thereto or used the same for the purposes of its business.

V.

On January 15, 1895, the Commissioner of the General Land Office, considering the survey so transmitted to him, as stated in finding II, addressed the following letter:

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *Jan.* 15, 1895.

To the U. S. marshal, *ex officio* surveyor-general, Sitka, Alaska.

SIR: With your letter dated March 15, 1893, was transmitted the plat of field notes of survey No. 31, executed by Albert Lascy, D. S., of a tract of land situated on Afognak bay, Afognak island, claimed by the Russian-American Packing Co., used for packing and cannery purposes.

The tract embraced in this survey is not in square form as required by statute.

The whole of Afognak island, its bays, rocks, and territorial waters, including the Sea Lion rocks and Sea Otter island, was made
9 a public reservation by the President's proclamation dated Dec. 24, 1892, which contains the following proviso:

"Provided that this proclamation shall not be so construed as to deprive any *bona fide* inhabitant of said island of any valid right he may possess under the treaty for the cession of the Russian possessions in North America to the United States concluded at Washington, on the 13th day of March, 1867."

Afognak island being a public reservation, and the lands embraced therein being exempted from disposal, survey No. 31 is therefore rejected, and you will notify the parties in interest of their right to appeal within 60 days.

Very respectfully, S. W. LAMOREUX,
Commissioner.

From which decision of the Commissioner no appeal was taken by the claimant.

VI.

Since the claimant company left said island it has employed a watchman to guard and watch its property, but notwithstanding such care and effort to preserve said property the same has deteriorated in value and is not worth more than one-fifth of its original cost. To what extent the property was deteriorated in value by use during the years 1889, 1890, 1891, and 1892 does not appear. Nor does it

appear that any effort was made by the claimant to sell or otherwise dispose of the improvements made by it on said lands or to remove the same therefrom, or that any objection to such removal was ever made by the defendants.

VII.

During the four years of claimant's occupation of said site on Afognak island, namely, in 1889, 1890, 1891, and 1892, it had built up a large business in the catching and canning of salmon, which business yielded a profit of $100,000 during said four years, of which about $35,000 was subsequent to the passage of the act of March 3, 1891. By reason of the claimant's removal from the site so entered upon by it pursuant to the President's proclamation and order as aforesaid, its business was totally destroyed. Said site so occupied was a valuable one for the purpose of salmon catching.

VIII.

The loss sustained by the claimant in having to remove from the land so entered upon by reason of the President's proclamation and order aforesaid was in excess of $3,000, exclusive of the sum of $433.80 so deposited by the claimant as set forth in finding II.

IX.

The claimant has never made application for the return of the money paid by it for such survey and has never received from the United States or from any other government or person any money or compensation whatever for the amount so deposited or for the loss of its property or injury to its business.

Conclusion of Law.

Upon the foregoing findings of fact the court decides as a conclusion of law:

1. That the claimant is not entitled to recover for the value of the improvements so erected by it on the land described in finding II, nor for the loss of profits arising from the claimant's removal from said land pursuant to the proclamation of the President.

2. The claimant is entitled to recover the sum of $433.80 deposited by it as set forth in finding II.

BY THE COURT.

10 V.—*Opinion of the Court.*

PEELLE, J., delivered the opinion of the court:

The claimant, a corporation organized under the laws of the State of California, brings this action to recover, on the theory of an im-

plied contract, damages alleged and found to have been caused to it by being dispossessed of certain lands and improvements thereon, on the island of Afognak, in the Territory of Alaska, by reason of the proclamation of the President of December 24, 1892, declaring said island of Afognak, including the land so claimed by the claimant, reserved for public purposes.

By the act of May 17, 1884 (23 Stats. L., 24), being an act to provide for "a civil government for Alaska," it was provided by the first proviso of section 8 "That the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them, but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress."

Early in the spring of the year 1889 the claimant purchased and caused to be shipped to said island of Afognak materials for the erection of a canning establishment for the purpose of canning salmon, and for that purpose, and without authority or license from the United States, other than said act of 1884, took possession of a site on said island containing 159.52 acres of land, and after clearing away the trees thereon erected buildings for the purpose aforesaid at a cost of about $45,000.

Thereafter, and while the claimant was in the possession of said lands and improvements and engaged in the canning business as aforesaid, Congress passed the act of March 3, 1891 (26 Stat. L., 1095–1100), being "An act to repeal timber-culture laws, and for other purposes," sections 12 and 13 of which read:

"SEC. 12. That any citizen of the United States twenty-one years of age, and any association of such citizens, and any incorporation incorporated under the laws of the United States or of any State or Territory in the United States now authorized by law to hold lands in the Territories *now or hereafter* in the possession of and occupying public lands in Alaska for the purpose of trade or manufactures, may purchase not exceeding one hundred and sixty acres, to be taken as near as practicable in a square form, of such land at two dollars and fifty cents per acre: *Provided*, That in case more than one person, association, or corporation shall claim the same tract of land the person, association, or corporation having the prior claim by reason of possession and continued occupation shall be entitled to purchase the same; but the entry of no person, association,
11 or corporation shall include improvements made by or in possession of another prior to the passage of this act.

"SEC. 13. That it shall be the duty of any person, association, or corporation entitled to purchase land under this act to make an application to the United States marshal, *ex officio* surveyor general of Alaska, for an estimate of the cost of making a survey of the lands occupied by such person, association, or corporation, and the cost of the clerical work necessary to be done in the office of the said United States marshal, *ex officio* surveyor general; and on the receipt of such estimate from the United States marshal, *ex officio* surveyor general,

the said person, association, or corporation shall deposit the amount in the United States depository, as is required by section numbered 2401, Revised Statutes, relating to deposits for surveys.

"That on the receipt by the United States marshal, *ex officio* surveyor-general, of the said certificates of deposit, he shall employ a competent person to make such survey, under such rules and regulations as may be adopted by the Secretary of the Interior, who shall make his return of his field notes and maps to the office of the said United States marshal, *ex officio* surveyor-general; and the said United States marshal, *ex officio* surveyor-general, shall cause the said field notes and plats of such survey to be examined, and if correct approve the same, and shall transmit certified copies of such maps and plats to the office of the Commissioner of the General Land Office.

"That when said notes and plats of said survey shall have been approved by the said Commissioner of the General Land Office, he shall notify such person, association, or corporation, who shall then, within six months after such notice, pay said United States marshal, *ex officio* surveyor-general, for such land, and patent shall issue for the same."

On April 1, 1892, the claimant made application, as provided by said section 13, and Revised Statutes, section 2401, to the United States marshal and *ex officio* surveyor-general of Alaska for a survey of the tract so entered upon by it under the provisions of said act of March 3, 1891; and under the direction of said marshal deposited in the sub-treasury at San Francisco $433.80, being the estimated cost of such survey. Thereafter said marshal and *ex officio* surveyor-general caused the survey of the ground so entered upon to be made, which he numbered 31, approved the same and forwarded it to the Commissioner of the General Land Office. But before the Commissioner had acted thereon, the President issued a proclamation declaring the whole island of Afognak, including the site so entered upon by the claimant, reserved for fish-culture stations, and warning all persons to depart therefrom. Pursuant to that proclamation the agents of the United States notified the claimant's officers thereof and ordered them to depart, which they did, leaving the improvements they had erected thereon, which have since been cared for by a watchman, though the property, for want of use, had deteriorated and been materially reduced in value, but to what extent by use does not appear.

January 15, 1895, the Commissioner of the General Land Office, considering the survey so made and transmitted to him for his action, declined to approve the same, assigning as his reasons therefor that the tract embraced in the survey was not in square form as required by the act of 1891, and for the further reason that "the
12 whole of Afognak island, its bays, rocks, and territorial waters, including the Sea Lion rocks and Sea Otter island, was made a public reservation by the President's proclamation dated December 24, 1892." For the reasons stated the survey was rejected and

the marshal was directed to notify the parties in interest of their right to appeal within sixty days, but no appeal appears to have been taken by the claimant, nor does any application appear to have been made for the return of the money so deposited.

During the period of the claimant's occupancy and conduct of its business on the site in the years 1889, 1890, 1891, and 1892 a business was built up from which the claimant derived a large profit. By reason of having to remove from the lands the claimant has been greatly damaged. No improvements appear to have been made on said lands subsequent to March 3, 1891.

The claimant's contention is that by virtue of the act of 1884 a contract arose whereby the claimant was given permission to enter upon and occupy said lands, with the right to purchase the same from the Government upon terms to be thereafter fixed by Congress, and that having complied with the terms of the act of 1891 it thereby became entitled to have said lands surveyed and a patent issued vesting in it the title to said lands, and that on failure so to do and dispossessing the claimant the Government is bound to respond in damages as for a breach of such contract.

The defendant's contention is that the President had the authority at any time before the issuance of the patent to withdraw the lands from sale and to declare the same reserved for public purposes, and that therefore, as such patent had not issued to the claimant, the title to said lands never vested in it, without which the claimant could not have been divested of any right from which an implied contract could arise to pay it for the improvements so made on said land, or from any loss of profits arising from its business.

By the act of 1884 providing a civil government for Alaska, it was provided, in respect to those persons then in the *actual use or occupation* of any lands in said district or then claimed by them, that they should not be disturbed in their possession. Such possession had been acquired prior to the organization of such civil government, and maybe prior to the cession of Alaska to the United States. It was doubtless for these reasons that the provision was inserted in the act, but the terms under which such persons might acquire title to such lands were reserved to future legislation by the Congress.

When the claimant entered upon the lands and erected thereon buildings for the purpose of conducting its business, it did so without the authority or license of the United States—none being given by the act of 1884—and was therefore a trespasser. Therefore, as the claimant was not, when that act was passed, in the *actual use or occupation* of the lands here in controversy, and was *not then claiming* the same, the act of 1884 has no application to it and hence no rights can be claimed thereunder. We are, therefore, unable to concur in the construction given to that act by the district court of Alaska in the case of Young *v.* Goldsteen (97 Fed. Rep., 303), holding that the act applied to those persons going upon the land subsequent to the passage of the act.

But as the claimant was, in its own wrong, in the possession of the lands so entered upon when the act of March 3, 1891, was
13 passed, the remaining question is, What rights, if any, did the claimant acquire under that act from which a contract can be implied to compensate it for losses sustained by reason of its enforced removal from the lands?

The claimant being at the time of the passage of the act a corporation organized under the laws of California, was authorized to hold lands in the Territories, and being then in the possession of and occupying the lands in question for the purpose of trade or manufactures, was entitled to purchase not exceeding 160 acres, to be taken as near as practicable in a square form, of such lands at $2.50 an acre.

But was the claimant, as against the United States, entitled to have the survey approved by the Commissioner and a patent issued vesting in it the title to said lands after the President, in the exercise of his power, had issued his proclamation declaring the whole of the island upon which the land was situate reserved for public purposes? (Grissar *v.* McDowell, 6 Wall., 336; United States *v.* Payne, 8 Fed. Rep. 833–888, and Wolcott *v.* Des Moines Co., 5 Wall., 681.)

Although prior to the passage of the act of 1891 the claimant had without authority entered upon the land in question and erected thereon buildings and machinery, it was, by reason of its possession and occupancy, given the right to purchase not exceeding 160 acres of land, for the purpose of trade or manufactures, upon the terms and conditions stated in the act. Such right, however, was no greater than that given by the act to those who might thereafter, for the purpose stated, be in the possession or occupancy of such lands. In this respect, therefore, the act of 1891 differs from the act of 1884. By the act of 1891 the claimant's occupancy was recognized for the purpose of giving it the right to be preferred in the purchase of such lands if offered for sale; but as no patent was issued to the claimant the title to said lands never vested in it.

In the Yosemite Valley case (15 Wall., 77–87) it was held, following the case of Frisbie *v.* Whitney (9 Wall., 187–194), "that under the preëmption laws mere occupation and improvement of any portion of the public lands of the United States, with a view to preëmption, do not confer upon the settler any right in the land occupied, *as against the United States*, or impair in any respect the power of Congress to dispose of the land in any way it may deem proper, and that the power of regulation and disposition conferred upon Congress by the Constitution only ceases when all the preliminary acts prescribed by those laws for the acquisition of the title, including the payment of the price of the land, have been performed by the settler. When these prerequisites have been complied with the settler for the first time acquires a vested interest in the premises occupied by him, of which he can not be subsequently deprived. He is then entitled to a certificate of entry from the local land officers, and ultimately to a patent for the land from the United States.

Until such payment and entry the acts of Congress give to the settler only a privilege of preëmption in case the lands are offered for sale in the usual manner; that is, the privilege to purchase them in that event in preference to others. The United States by those acts enter into no contract with the settler, and incur no obligation to anyone that the land occupied by him shall ever be put up for sale. They simply declare that in case any of their lands are thrown open for sale the privilege to purchase them in limited quantities, at fixed prices, shall be first given to parties who have settled upon and improved them. The legislation thus adopted for the benefit
14 of settlers was not intended to deprive Congress of the power to make any other disposition of the lands before they are offered for sale, or to appropriate them to any public use."

The claimant contends, however, that inasmuch as it had erected valuable improvements upon the land in reliance upon its title and the good faith of the Government, and had paid the amount necessary to defray the expenses of the proceedings preliminary to making a final entry, that therefore the case comes more nearly within the rule announced in the case of Lytle *v.* State of Arkansas (9 How., 314–333), where it is said: "It is a well-established principle that where an individual, in the prosecution of a right, does everything which the law requires him to do, and he fails to attain his right by the misconduct or neglect of a public officer, the law will protect him.' In this case the preëmption right of Cloyes having been proved, and an offer to pay the money for the land claimed by him, under the act of 1830, nothing more could be done by him and nothing more could be required of him under that act. And subsequently, when he paid the money to the receiver, under subsequent acts, the surveys being returned he could do nothing more than to offer to enter the land, which the register would not permit him to do. This claim for preëmption stands before us in a light not less favorable than it would if Cloyes or his representatives had been permitted by the land officers to do what in this respect was offered to be done."

But that case is quite different from the one before us. There the contest was between two claimants to lands open for sale. Here the contest is between the claimant and the Government respecting lands withdrawn from sale; and, having been withdrawn from sale, no right of preëmption could attach, unless the proclamation of the President reserving the lands for public purposes was in violation of law.

The claimant doubtless by what it did acquired as against all but the United States the right to purchase the land if open to sale, or as was said in the Yosemite Valley case, "Such claim, it must be remembered, is only a claim to be preferred in the purchase of lands of the United States in limited quantities, at fixed prices, when the lands are offered for sale in the usual manner. When one has acquired this claim by complying with the conditions of the law for its acquisition he has a legal right to be thus preferred when the

sale is made as against others asserting a similar right under the law which the court will enforce in proper cases. But the claim of preemption, as already said, can never arise when the law does not provide for a sale of the property. Until thus sanctioned by the law the claim, as stated by the court in that case (Lytle *v.* State of Arkansas), has no existence as a substantive right."

That the President had the authority by proclamation to withdraw the lands from sale and to set them apart for public purposes has been frequently decided, and therefore no neglect or fault can be attributed to him in the premises. In the case of Grissar *v.* McDowell (6 Wall., 363–381), in speaking of the authority of the President in this respect the court said:

"From an early period in the history of the Government it has been the practice of the President to order, from time to time, as the exigencies of the public service required, parcels of land belonging to the United States to be reserved from sale and set apart for public uses. The authority of the President in this respect is recognized in numerous acts of Congress. Thus, in the preëmption act of May 29, 1830, it is provided that the right of preëmption contemplated by the act shall not 'extend to any land which is reserved from sale by act of Congress, or *by order of the President*, or which may have been appropriated for any purpose whatever.'" To the same effect also is the case of United States *v.* Payne (8 Fed. Rep., 883–888).

True the right to purchase not exceeding 160 acres of land was given to the claimant by the act of 1891 on the condition, among others, that it was in the possession of and occupying such lands for the purpose of trade or manufactures, but such right can not be construed as depriving the Government of its superior right to withdraw such lands from sale and to set them apart for public purposes prior to the issuance of a patent therefor. Hence any improvements made on such lands before they were withdrawn from sale and reserved for public purposes was at the risk of those seeking to purchase. But with respect to the money deposited with the proper agent of the Government, set forth in finding II, it is shown that the same was deposited on the faith of the act of 1891, and the Government having withdrawn the lands from sale and thereby denied to the claimant a patent vesting in it the title to such lands, the claimant is entitled, in lieu of the lands, to a return of the money so deposited, and for that amount judgment is ordered to be entered.

Weldon, J., did not sit in this case and took no part in the decision.

15 VI.—*Judgment of the Court.*

THE RUSSIAN AMERICAN PACKING COMPANY
vs.
THE UNITED STATES. } No. 20758.

At a Court of Claims held in the city of Washington May 16th 1904 judgment was ordered to be entered as follows:

The court on due consideration of the premises find for the claimant, and do order, adjudge and decree, that the said Russian American Packing Company, claimant, do have and recover of and from the United States the sum of four hundred and thirty three dollars and eighty cents ($433\frac{80}{100}$).

BY THE COURT.

16 VII.—*Application for and Allowance of Appeal.*

THE RUSSIAN-AMERICAN PACKING COMPANY
vs.
THE UNITED STATES. } No. 20758.

Now comes the claimant, by its attorney of record, and makes application for, and gives notice of, an appeal to the Supreme Court of the United States from the judgment of this court rendered in the above-entitled cause, on the 16th day of May, 1904.

JOHN SIDNEY WEBB,
Attorney for Claimant.

BRITTON & GRAY, *Of Counsel.*

Filed August 5, 1904.

Order.

Let the above appeal be allowed.
August 6, 1904.

C. C. NOTT,
Chief Justice.

17 Court of Claims.

THE RUSSIAN-AMERICAN PACKING COMPANY
vs.
THE UNITED STATES. } No. 20758.

I, John Randolph assistant clerk of the Court of Claims hereby certify that the foregoing are true transcripts of the pleadings in

above-entitled cause, of the findings of fact and conclusions of law filed by the court, of the opinion of the court, of the judgment of the court, of the application for and allowance of appeal to the Supreme Court of the United States.

Seal Court of Claims.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims this 11th day of August 1904.

JOHN RANDOLPH,
Ass't Clerk Court of Claims.

Endorsed on cover: File No. 19,451. Court of Claims. Term No. 351. The Russian American Packing Company, appellant, *vs.* The United States. Filed August 22d, 1904. File No. 19,451.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, ~~1904~~ 1905.

No. ~~852~~ 86.

THE ROYAL PACKING COMPANY, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED AUGUST 22, 1904.

(19,452.)

(19,452.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 352.

THE ROYAL PACKING COMPANY, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

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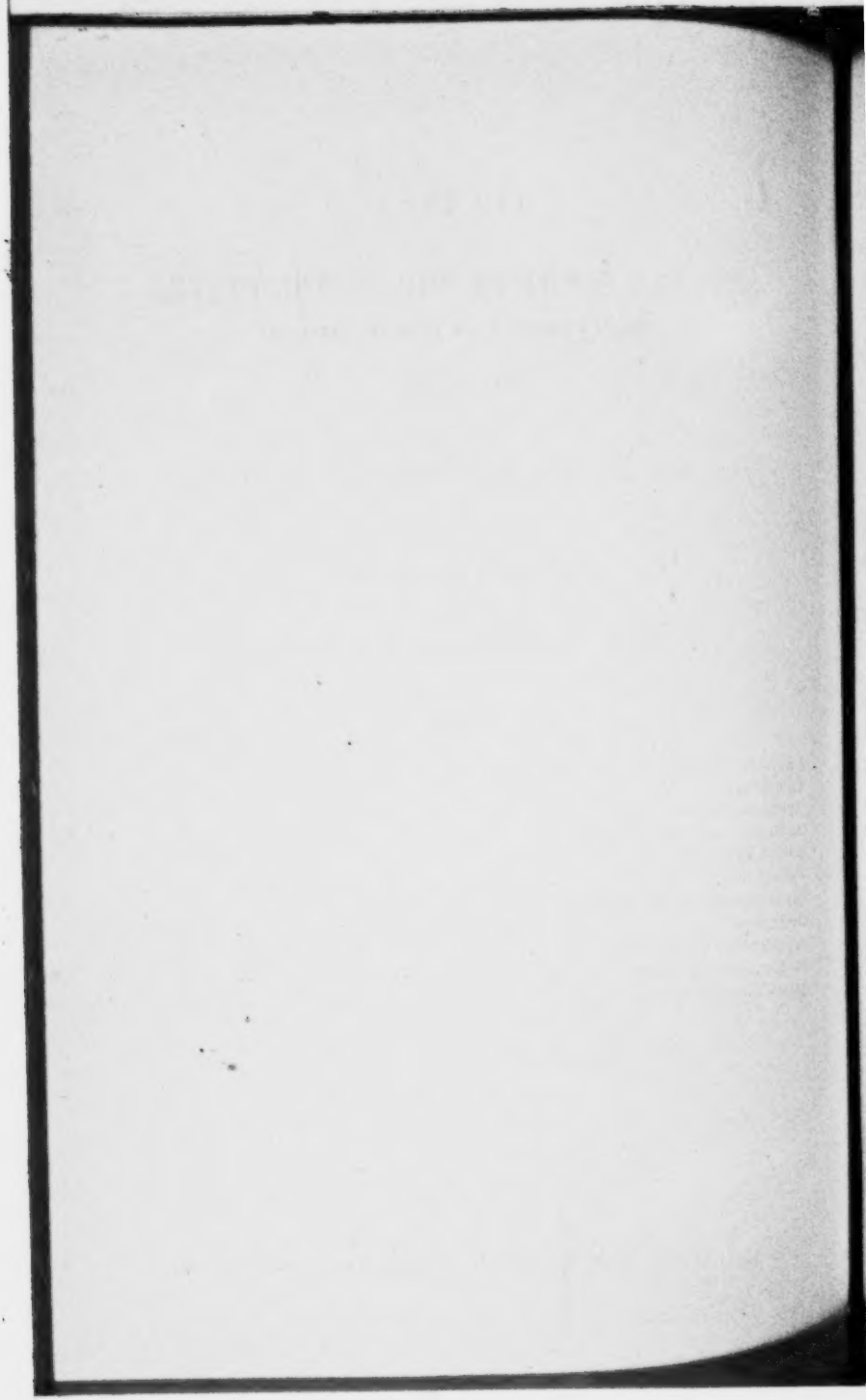
JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., OCTOBER 5, 1904.



1 Court of Claims.

THE ROYAL PACKING COMPANY (a Corporation)
vs.
THE UNITED STATES. } No. 20759.

I.—*Petition. Filed April* 14, 1897.

To the honorable the judges of the Court of Claims:

The petition of the Royal Packing Company respectfully represents—

1. That the Royal Packing Company, the claimant herein, is a corporation duly incorporated under and by virtue of the laws of the State of California, and that as such corporation your petitioner was privileged to acquire and hold lands and operate various franchises in the State of California and in the Territories of Washington and Alaska in the United States.

2. That after the incorporation of this company, to wit, March, 1889, your petitioner entered upon a certain tract of land in Alaska, the same being on Afognak island, on the north shore of Afognak bay, containing a certain number of acres, to wit, one hundred and thirty-two and ninety-four one hundredths (132.94) acres and began immediately to make improvements thereon.

3. That at the date of the passage of the act of Congress entitled "An act to repeal the timber culture laws and for other purposes, approved March 3, 1891 (26 Stat. at Large 1100), which provided among other things that—

"Any citizen of the United States twenty-one years of age, now or hereafter in possession of and occupying public lands in
2 Alaska, for the purpose of trade or manufactures, may purchase not exceeding one hundred and sixty acres, to be taken as nearly as practicable in a square form, of such land, at two dollars and fifty cents per acre; *Provided*, That in case more than one person, association or corporation shall claim the same tract of land, the person, association or corporation having the prior claim by reason of the possession and continued occupation shall be entitled to purchase the same; but the entry of no person, association or corporation shall include improvements made by or in possession of another prior to the passage of this act,"

your petitioner was still, and had been continuously from the month of March, in the year 1889, in possession of and occupying said tract of land for the purpose of trade and manufactures, and has made improvements thereon of the value of twenty-four thousand ($24,000) dollars; that on the ninth day of November, in the year 1891, pursuant to and in accordance with the provisions of said act and the regula-

tions adopted by the Secretary of the Interior, your petitioner made application, under oath, to the United States marshal, and *ex officio* surveyor-general of Alaska, for estimates of the sums required deposited for field and office work in the making of a survey of said tract; that in response to said application your petitioner was notified by the officer aforesaid that the sum of one hundred and thirty-five ($135) dollars would be required for that purpose; that thereupon petitioner deposited said sum in the United States depository in San Francisco in accordance with section 2401 of the Revised Statutes, for which sum certificates were duly issued; that said certificates were thereafter received by said marshal and *ex officio* surveyor-general, who caused a correct survey of said tract to be made in accordance with the regulations adopted by the Secretary of the Interior, the field notes, maps and plats of this survey, which was known as survey number twenty-three (23) were duly returned
3 to the proper office, approved by said marshal and *ex officio* surveyor-general, and certified copies of the same forwarded to the General Land Office; that thereupon your petitioner made application for the purpose of purchasing said land under said statute.

4. That between the third of March, in the year 1891, and the twenty-fourth of December, in the year 1892, your petitioner made, upon said tract, improvements of the value of two thousand two hundred and fifty ($2,250) dollars in addition to those hereinbefore mentioned.

5. That on the third of March, in the year 1891, and up to and until the twenty-fourth of December, in the year 1892, the tract of land aforesaid had not been selected by the United States commissioner of fish and fisheries for the purpose of establishing fish culture stations.

6. That on the twenty-fourth of December, in the year 1892, the President of the United States, by virtue of said act of the third of March, in the year 1891, and other laws of the United States, issued a proclamation which declared, among other things, that the whole island of Afognak including the property of your petitioner, was reserved for public purposes.

7. That, by the same proclamation, warning was expressly given to all persons, including your petitioner—

"Not to enter upon or occupy the tracts of land or waters reserved by this proclamation, or to fish in or to use any of the waters herein described or mentioned; that all persons or corporations now occupying said island or any of said premises, except under said treaty, to wit, the treaty of the cession of the Russian possessions in North America to the United States concluded March 30th, 1867, shall depart therefrom."

8. That at the date of said proclamation and reservation your petitioner was and had been continuously, from the time before mentioned, to wit, since the month of March in the year 1889, in
4 the actual and exclusive use, occupation and possession of said tract of land and improvements, and that your petitioner

did not occupy the same under and by virtue of the treaty mentioned in said proclamation, and accordingly, in obedience to the mandate of the Government, as expressed in the above mentioned proclamation, departed therefrom.

9. That on or about the fifteenth of January, in the year 1895, the Commissioner of the General Land Office rejected and disapproved the aforesaid survey and application of your petitioner because and on account of the reservations made as aforesaid.

10. That the act of the seventh of May, in the year 1884, was in the nature of a contract by the United States with your petitioner, that it should not be disturbed in its possession, and should be allowed to acquire title to said tract of land; that, relying upon said contract, your petitioner made improvements and built up and had upon said tract, on the third of March, in the year 1891, and the twenty-fourth of December, in the year 1892, an extensive and increasing trade and business; that on the dates aforesaid the trade and business of your petitioner was reasonably worth the sum of ninety thousand ($90,000) dollars; that by reason of the breach of said contract by the United States the trade and business aforesaid was entirely lost and ruined to your petitioner, whereby your petitioner suffered damage to the full extent of the value of said business.

11. That your petitioner has never been paid for any of said improvements or for any portion of said damage by it sustained; nor has its deposit of three hundred and sixty-seven dollars and twenty-five cents ($367.25) for the surveying of this tract or any part thereof ever been returned to it, wherefore and by reason of the aforesaid acts of the Government, the property of your petitioner has been taken by the United States for public purposes without just compensation, contrary to the provisions of the Constitution, the law of the land, and there is now justly due and owing to your petitioner on account thereof the sum of one hundred and nineteen thousand and forty-five dollars and twenty-six cents ($119,045.26).

Wherefore your petitioner prays judgment against the United States of America for the sum of one hundred and nineteen thousand and forty-five dollars and twenty-six cents ($119,045.26).

ROYAL PACKING COMPANY,
[SEAL.] By LEON SLOSS, *Pres.*

WEBB, WEBB & LINDSLEY,
Attorneys for Claimants,
National Union Building,
No. 918 F St. N. W., Washington, D. C.

I do solemnly swear that I have read the foregoing petition by me subscribed and know the contents thereof; that the facts therein stated upon my personal knowledge are true and those stated upon information and belief I believe to be true.

LEON SLOSS.

Subscribed and sworn to before me this 3d day of April, A. D. 1897.

[SEAL.] F. D. MONCKTON,
Commissioner U. S. Circuit Court, Northern District of California, and Clerk U. S. Circuit Court of Appeals, Ninth District.

6 II.—*Traverse. Filed April* 26, 1904.

In the Court of Claims of the United States, December Term, A. D. 1903.

ROYAL PACKING CO. *vs.* THE UNITED STATES. } No. 20759.

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

L. A. PRADT,
Assistant Attorney General.

III.—*Argument and Submission.*

This cause was argued and submitted on the 26th day of April, 1904.

7 IV.—*Findings of Fact and Conclusion of Law. Filed May* 16, 1904.

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

Findings of Fact.

I.

The claimant herein, a corporation, was organized under the laws of the State of California October 15, 1888, for the purpose of catching and preserving salmon at the island of Afognak, Territory of Alaska, and as such corporation in the fall of 1888 and the spring of 1889 purchased and shipped to said island materials for the erection of a cannery and buildings for the purpose of canning salmon, and for that purpose and without authority or license from the United States other than whatever right it may have had under

the act of May 17, 1884 (23 Stats. L., 24), took possession of a site on said island containing one hundred and thirty-two and ninety-four hundredths (132.94) acres, and after clearing the trees therefrom, erected such cannery and buildings at a cost of forty-six thousand dollars ($46,000), prior to which time no person or corporation had been in possession of said ground.

The claimant was and had been continuously, since taking possession of said ground for the purpose aforesaid, occupying and using the same, and was in possession thereof at the date of the passage of the act of March 3, 1891 (26 Stats. L., 1100), entitled "An act to repeal the timber-culture laws and for other purposes."

II.

On November 6, 1891, the claimant made application to the United States marshal and *ex officio* surveyor general of Alaska for the survey of said tract of land under the provisions of said act of March 3, 1891, and in response to the notification of such officer,
deposited in the United States subtreasury in San Francisco
8 the estimated cost of such survey, $367.35. Thereupon said marshal and *ex officio* surveyor general caused a survey of said ground to be made, which he numbered 23, approved the same March 15, 1893 and forwarded it to the Commissioner of the General Land Office for his action.

III.

Subsequent to the passage of said act of March 3, 1891, and until December 24, 1892, the claimant continued to occupy said tract of land and to carry on its canning business and keep its plant in repair. What improvements, if any, were made on such lands subsequent to the passage of the act of March 3, 1891, does not appear. Prior to December 24, 1892, the ground so used and occupied by the claimant had not been reserved by the United States for fish culture or any other purpose, nor had the same been purchased, entered upon, or applied for by any other person or corporation than the claimant. Said land was not mineral in character.

IV.

On December 24, 1892, the President of the United States issued a proclamation declaring the whole island of Afognak, including the site so entered upon, occupied and improved by the claimant reserved for the purpose of establishing thereon United States fish culture stations, and warning all persons to depart therefrom. In July, 1893, the agent of the United States for protection of salmon fisheries informed the agents of claimant of said proclamation and ordered claimant company to depart therefrom which it did, leaving its property thereon and has not since returned thereto or used the same for the purposes of its business.

V.

On January 15, 1895, the Commissioner of the General Land Office, considering the survey so transmittted to him as stated in finding II, addressed the following latter:

9 "SIR: With your letter dated March 15, 1893, was transmitted the plat and field notes of survey No. 23, executed by Albert Lascy, deputy surveyor, of a tract of land situated on Afognak bay, Afognak island, claimed by the Royal Packing Company, and used for cannery purposes. This tract is not in square form, being five times longer along the beach than wide.

"The whole of Afognak island, its bays, rocks, and territorial waters, including Sea Lion rocks and Sea Otter island, was made a public reservation by the President's proclamation dated December 24, 1892, which contains the following proviso:

"'*Provided*, That this proclamation shall not be so construed as to deprive any *bona fide* inhabitant of said island of any valid right to the same possessed under the treaty for the cession of the Russian possessions in North America to the United States, concluded at Washington on the 30th day of March, 1867.'

"Afognak island being a public reservation and the lands embraced therein being exempted from disposal, survey No. 23 is therefore rejected, and you will notify the parties in interest of their right to appeal within sixty days.

"Very respectfully, S. W. LAMOREUX,
"*Commissioner.*"

from which decision of the Commissioner no appeal was taken by the claimant.

VI.

Since the claimant company left said island it employed a watchman to guard and attend to its improvements and machinery on said island of Afognak but notwithstanding such care and effort to preserve said property the same has deteriorated in value and is not now worth more than about one-fifth of its original cost. To what extent the property was deteriorated in value by use during the years 1889, 1890, 1891 and 1892, does not appear. Nor does it appear that any effort was made by the claimant to sell or otherwise dispose of the improvements made by it on said lands or to remove the same therefrom or that any objection to such removal was ever made by the defendants.

VII.

During the four years of claimant's occupation of said site, namely, in the years 1889, 1890, 1891 and 1892, it built up a large business in the catching and canning of salmon, which business produced a profit of fifty-five thousand dollars ($55,000) during said four years, of which amount about $— was subsequent to the

passage of the act of March 3, 1891. By reason of the claimant's removal from the site so entered upon by it pursuant to the
10 President's proclamation and order aforesaid, its business was totally destroyed. Said site so occupied was a valuable one for the purpose of salmon catching.

VIII.

The loss sustained by the claimant in having to remove from the lands so entered upon by reason of the President's proclamation and order aforesaid, was in excess of $3,000, exclusive of the sum of $367.35 so deposited by the claimant as set forth in finding LL.

IX.

The claimant has never made application for the return of the money paid by it for said survey, and has never received from the United States or from any other government or person any money or compensation whatever for the amount so deposited for said survey, for the loss of its property, or for injury to its business.

Conclusion of Law.

From the foregoing findings of fact the court decides as a conclusion of law, on the authority of The Russian American Packing Company *v.* U. S. (39 C. Cls., —):

1. That the claimant is not entitled to recover for the value of the improvements so erected by it on the land described in the findings, nor for the loss of profits arising from the claimant's removal from said land pursuant to the proclamation of the President.

2. That the claimant is entitled to recover the sum of $367.35 deposited by it as set forth in finding II.

BY THE COURT.

(See the opinion of the court set out in the record on appeal in the case of the *Russian-American Packing Company.*)

11 V.—*Judgment of the Court.*

THE ROYAL PACKING COMPANY
vs.
THE UNITED STATES. } 20759.

At a Court of Claims held in the city of Washington on the 16th day of May, 1904, judgment was ordered to be entered as follows:

The court upon due consideration of the premises find for the claimant, and do order, adjudge and decree that The Royal Packing Company, claimant, do have and recover of and from the United States the sum of three hundred and sixty-seven dollars and thirty-five cents ($367\frac{35}{100}$).

BY THE COURT.

12 VI.—*Application for and Allowance of Appeal.*

THE ROYAL PACKING COMPANY
vs.
THE UNITED STATES. } 20759.

Now comes the claimant, by its attorney of record, and makes application for and gives notice of, an appeal to the Supreme Court of the United States from the judgment of this court rendered in the above-entitled cause on the 16th day of May, 1904.

JOHN SIDNEY WEBB,
Att'y for Claimant.

BRITTON AND GRAY, *Of Counsel.*

Filed August 5, 1904.

Order.

Let the above appeal be allowed.

C. C. NOTT,
Chief Justice.

August 6, 1904.

13 Court of Claims.

THE ROYAL PACKING COMPANY
vs.
THE UNITED STATES. } 20759.

I John Randolph assistant clerk of the Court of Claims, hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact and conclusion of law filed by the court, of the judgment of the court, of the application for and allowance of appeal to the Supreme Court of the United States.

Seal Court of Claims. In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims this 11th day of August, 1904.

JOHN RANDOLPH,
Ass't Clerk Court of Claims.

Endorsed on cover: File No. 19,452. Court of Claims. Term No. 352. The Royal Packing Company, appellant, *vs.* The United States. Filed August 22d, 1904. File No. 19,452.

FILE COPY.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

Supreme Court, U. S.
FILED
NOV 10 1905
JAMES H. MCKENNEY,
Clerk.

No. 85.

RUSSIAN-AMERICAN PACKING COMPANY

vs.

THE UNITED STATES.

No. 86.

ROYAL PACKING COMPANY

vs.

THE UNITED STATES.

APPEALS FROM THE COURT OF CLAIMS.

BRIEF IN BEHALF OF APPELLANTS.

ALDIS B. BROWNE,
ALEX. BRITTON,
Counsel for Appellants.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1905.

No. 85.

RUSSIAN-AMERICAN PACKING COMPANY

vs.

THE UNITED STATES.

No. 86.

ROYAL PACKING COMPANY

vs.

THE UNITED STATES.

STATEMENT.

These cases, in all respects similar, excepting as to the parties and the amounts involved, were originally brought before the Court of Claims upon petitions, each of which in substance averred:

1. That the claimant herein is a company which was duly incorporated under the laws of the State of California in the year 1889 for the purpose of carrying on the business of packing salmon on the island of Afognak, Territory of Alaska, and that as such corporation it was privileged to acquire and hold lands in said Territory.

2. That subsequent to such incorporation, and in the spring of 1889, claimant purchased and shipped to said island of Afognak materials for the erection of a cannery and buildings for the purpose of canning salmon, took possession of a site thereon containing one hundred and fifty-nine and fifty-two one-hundredths (159.52) acres, cleared the trees therefrom and erected such cannery and buildings, and that prior to that time no person or corporation had been in possession of such ground.

3. That at the date of the passage of the act of Congress of March 3, 1891 (26 Stats. at Large, 1100), entitled "An act to repeal the timber-culture laws and for other purposes," claimant was and had been continuously since 1889 in the sole and exclusive possession of said grounds, occupying and using the same as a site for its cannery, and had erected thereon buildings, machinery, boats, and lighters costing $50,000.

4. That on April 1, 1892, claimant made application to the United States marshal and *ex-officio* surveyor general of Alaska for the survey of said tract, under the provisions of said act of March 3, 1891, and in response to the notification of such officer deposited in the United States subtreasury at San Francisco the estimated cost of such survey, $433.80, and thereupon said marshal and *ex-officio* surveyor general caused a survey of said ground to be made, which he numbered thirty-one (31), approved the same March 15, 1893, and forwarded it to the Commissioner of the General Land Office.

5. That subsequently to said 3d day of March, 1891, and until December 24, 1892, claimant continued to occupy said tract of land and to carry on its canning business and to erect valuable improvements thereon.

6. That prior to the 24th day of December, 1892, the said ground so used and occupied by claimant had not been reserved by the United States for fish culture or any other purposes; had not been purchased, entered, or applied for by any other person or corporation than claimant, and was non-mineral in character.

7. That on December 24, 1892, the President of the United States issued a proclamation declaring the whole island of Afognak, including the site occupied and improved by claimant, reserved for the purpose of establishing United States fish-culture stations, and warning all persons to depart therefrom; that in July, 1893, the agent of the United States for the protection of salmon fisheries informed the agents of claimant on said island of such proclamation and ordered them to depart therefrom, and that in obedience to such order and proclamation claimant left the island and its property thereon and has not since returned thereto or used the same for the purposes of its business.

8. That on January 15, 1895, the Commissioner of the General Land Office refused to accept, disapproved, and rejected the said survey (No. 31) of the land occupied and used by claimant on said island of Afognak for reason that the land had been reserved for public purposes on December 24, 1892, as aforesaid.

9. That claimant has employed a watchman to guard and attend to its improvements and machinery on said island of Afognak since it was forced to leave the same, but that notwithstanding such care and effort to preserve said property it is now practically worthless, and is not worth more than one-fifth of its original cost, and that no part of such property could have been at any time sold or taken from such island to be used elsewhere.

10. That during the four years of claimant's occupation of said site on Afognak island—viz., 1889, 1890, 1891, and 1892—it built up a large business in the catching and canning of salmon, which business produced a profit of $102,000 during said period, and that such business was totally destroyed by reason of claimant being required to remove from said island by the President's proclamation aforesaid, and that such site was a very valuable one for the purposes of salmon canning.

11. That the total loss sustained by claimant by virtue of its being forced to remove from said island of Afognak under the President's said proclamation of December 24, 1892, amounted to $146,433.80, $100,000 of which was caused by the loss of the business of claimant on said island, $40,000 by the loss of its buildings and machinery thereon, $6,000 by the loss of its boats and lighters, and $433.80 having been paid by it for survey No. 31, above mentioned.

12. That claimant has never made application for the return of the money paid by it for said survey, and has never received from the United States or from any other government or person any money or compensation whatever for the amount so deposited for survey, for the loss of its property or for the injury to its business on Afognak island.

Before the Court of Claims the petitioners did not press the claim for damages on account of the loss of prospective business, but urged judgment for the moneys paid the United States and for the loss of the plants in question.

The Court of Claims, after finding certain facts (Record, pp. 4, 5, 6, and 7), concluded that when appellants took possession of the land on Afognak island they did so in trespass and not under the authority of the United States as expressed in the act of May 17, 1884 (23 Stats., 24); that whilst the subsequent act of March 3, 1891 (26 Stats., 1095–

1100), authorized the possession and purchase of not to exceed one hundred and sixty acres of land for purposes of trade and manufacture, no patent had issued to appellants, and the United States had the right prior to the issuance of patents to reserve the land for public purposes. Recovery of the value of the improvements was thus denied, but judgment was rendered for the amount of money received from appellants on account of the survey of the claims in question.

Assignments of Error.

I.

In holding that appellants entered upon this land in trespass, and not under the authority of the act of May 17, 1884.

II.

In holding that appellants, being in possession of the land when the act of March 3, 1891, was passed, and engaged in manufacture and trade, did not seasonably take all the steps necessary to secure the issuance of a patent.

III.

In holding that steps so taken by appellants did not legally and equitably bar the United States from reserving said land for any purpose.

IV.

In holding that appellants were not entitled to judgment for the value of the improvements on said land when reserved by the United States.

ARGUMENT.

The only question of law involved in this case is whether or not the United States is liable to the claimant for the loss of its improvements placed upon the public lands in Alaska under a claim of occupancy, and the loss of its business carried on upon such lands caused by the act of the executive branch of the Government in withdrawing same from disposition and reserving them for public purposes.

We contend that the Government is so liable, both upon general principles of law and also by virtue of the act of Congress approved May 17, 1884 (23 Stats., 24).

As shown by the uncontroverted evidence introduced by the claimant, the Russian American Packing Company entered upon Afognak island in the year 1889 and erected many and valuable improvements thereon, relying upon its right of possession and its belief that Congress would by future legislation provide a means whereby it and other claimants to public lands in Alaska could obtain title thereto. Congress did enact such legislation by the act of March 3, 1891 (26 Stats., 1095), which act reads as follows:

> "SEC. 12. That any citizen of the United States "twenty-one years of age, and any association of such "citizens, and any incorporation incorporated under "the laws of the United States or of any State or "Territory in the United States now authorized by "law to hold lands in the Territories *now or hereafter* "*in the possession of and occupying public lands in* "*Alaska* for the purpose of trade or manufactures, *may* "*purchase* not exceeding one hundred and sixty acres, "to be taken as near as practicable in a square form, "of such land at two dollars and fifty cents per acre: "*Provided*, That in case more than one person, asso- "ciation or corporation shall claim the same tract of "land the person, association or corporation having "the prior claim by reason of possession and contin- "ued occupation shall be entitled to purchase the

"same; but the entry of no person, association or "corporation shall include improvements made by "or in possession of another prior to the passage of "this act.

"SEC. 13. That it shall be the duty of any person, "association or corporation entitled to purchase land "under this act to make an application to the United "States marshal, *ex-officio* surveyor general of Alaska, "for an estimate of the cost of making a survey of the "lands occupied by such person, association or cor- "poration, and the cost of the clerical work necessary "to be done in the office of the said United States "marshal, *ex-officio* surveyor general; and on the re- "ceipt of such estimate from the United States mar- "shal, *ex-officio* surveyor general, the said person, "association or corporation shall deposit the amount "in the United States depository, as is required by "section numbered 2401, Revised Statutes, relating to "deposits for surveys.

"That on the receipt by the United States marshal, "*ex-officio* surveyor general, of the said certificates of "deposit, he shall employ a competent person to make "such survey, under such rules and regulations as "may be adopted by the Secretary of the Interior, "who shall make his return of his field-notes and "maps to the office of the said United States marshal, "*ex-officio* surveyor general; and the said United "States marshal, *ex-officio* surveyor general, shall cause "the said field-notes and plats of such survey to be "examined, *and if correct approve the same*, and shall "transmit certified copies of such maps and plats to "the office of the Commissioner of the General Land "Office.

"That when the said notes and plats of said survey "*shall have been approved by the said Commissioner of* "*the General Land Office*, he shall notify such person, "association or corporation, who shall then, within "six months after such notice, pay to the said United "States marshal, *ex-officio* surveyor general, for such "land, *and p atent shall issue for the same.*"

At an early date after the passage of this act claimant herein took the necessary preliminary steps to perfect its title by applying for and having executed a survey of the lands claimed and occupied by it, after paying to a Government depository the full cost thereof. After the execution of such survey, but before the same was approved by the surveyor general of Alaska and forwarded to the General Land Office, the land was withdrawn from disposition by executive proclamation, and thereupon and thereunder claimant was compelled to leave the land by the officers of the Government, and was prevented from applying to purchase the same and making entry thereof under the trade and manufactures clause of the act of 1891, *supra*. It thus appears that claimant had done everything possible to protect its interests, and that its failure in such efforts and its losses consequent upon the above-mentioned executive action were not caused or affected by its own act, laches, or neglect.

It follows, therefore, that claimant has sustained the damages set up in its petition solely because of the act of the Government in withdrawing from sale and entry lands occupied and claimed by it for several years, and to which it had taken all possible steps to acquire title. That the Government is liable, upon the grounds of conscience and good faith, to make compensation for the damages so caused by it to an innocent party acting in good faith in the prosecution of a claim to public land cannot be doubted. That the Government is so liable upon strict legal grounds as well we also maintain.

We are well aware of the decision in the Yosemite Valley case (15 Wall., 77), which holds that—

> "a party by mere settlement upon lands of the
> "United States, with a declared intention to obtain a
> "title to the same under the pre-emption laws, does
> "not thereby acquire such a vested interest in the
> "premises as to deprive Congress of the power to
> "divest it by a grant to another party."

But we call attention to the fact that in the case at bar there has been something more than mere settlement upon the public lands; that claimant here has erected many and valuable improvements in reliance upon its title and the good faith of the Government; that it has taken every possible step to perfect such title and actually paid to the United States the amount necessary to pay the cost of the proceeding preliminary to making final entry, and would have made such final entry prior to the executive proclamation of December 24, 1892, had the survey been completed and approved within a reasonable time after the application therefor had been filed and the fees thereon paid by claimant. The case of the claimant herein, therefore, comes less within the doctrine of the Yosemite Valley case, *supra*, than within the rule laid down in the case of Lytle *vs.* State of Arkansas (9 Howard, 333), to wit:

> "It is a well-established principle, that when an "individual, in the prosecution of a right, does every- "thing which the law requires him to do, and he "fails to attain his right by the misconduct or neglect "of a public officer, the law will protect him. In "this case the pre-emptive right of Cloyes having "been proved, and an offer to pay the money for the "land claimed by him, under the act of 1830, nothing "more could be done by him, and nothing more could "be required of him under that act. And subse- "quently, when he paid the money to the receiver, "under subsequent acts, the surveys being returned, "he could do nothing more than offer to enter the "land, which the register would not permit him to "do. This claim of pre-emption stands before us in "a light not less favorable than it would have stood "if Cloyes or his representatives had been permitted "by the land officers to do what, in this respect, was "offered to be done."

Not only upon principles of right and justice is the United States liable for the losses occasioned to plaintiff by the reservation of the lands claimed by it in Alaska, but also by

reason of a statutory enactment. The proviso to section 8 of the act of May 17, 1884, aforesaid, providing a government for the district of Alaska, declared—

> "That the Indians or other persons in said district "shall not be disturbed in the possession of any lands "actually in their use or occupation or now claimed "by them, but the terms under which such persons "shall acquire title to such lands is reserved for future "legislation by Congress."

This declaration was a solemn assurance by Congress that the persons in possession of the public lands of Alaska should be permitted to acquire title thereto without being disturbed in their possession. It was in the nature of a statutory contract whereby the United States obligated itself to protect the settlers of Alaska and confer upon them title to the lands occupied by them without the danger of any interference or molestations by others, even the United States itself.

In Young *vs.* Goldsteen (97 Fed. Rep., 303) the district court of Alaska considered this legislation and held:

> "In our opinion, the language used is susceptible "of but one construction; *i. e.*, that Congress guaran- "teed to all persons in possession of lands in Alaska "at that date the right ultimately to acquire a perfect "title to the same. *If anything less was intended, then "the act was wholly meaningless. If Congress meant only "to guarantee to them undisturbed possession for the time "being, reserving the right to ultimately pass such laws as "would confiscate the property to the Government*, or give "it to another *then the act is worse than a mockery.* If "the expression 'the terms under which such persons "'may acquire title' means anything, it means that "at some future date the Congress will pass the need- "ful legislation whereby their possession will ripen "into perfect ownership. And until such legislation is "enacted the 'future legislation' is yet to be achieved. "*It is not too broad a construction of the language used to "apply it to those who, in good faith, were the first to take "up, occupy, and improve the public lands since that "date.* With the absolute guaranty of possession to

"those in possession of lands prior to May 17, 1884, "and with the laws relating to mineral lands only "having been extended to Alaska, *all persons* had a "right to expect protection from Congress if they "were the first in point of time to go upon the public "domain, and occupy and improve the same, *even "though they went there after May 17, 1884.*"

So, also, in the case at bar, if Congress induced the claimant to enter upon, occupy, and erect valuable improvements on the public domain, and to expend sums of money in attempting to gain title thereto, only to confiscate to the Government the land so occupied and improved, then the provision in the act of 1884 above quoted was a hollow mockery, and might better have been omitted from the statute books. If, however, Congress by such provision extended a standing invitation to all citizens of the United States to enter upon and develop the vast and theretofore unexploited resources of Alaska, and guaranteed for their enterprise and labors a certain title to the lands exploited, then the act is given a meaning which it would otherwise wholly lack. This is the construction which the court has given to the statute in the above-cited case, and this, we maintain, is the correct construction. In support of this view it is but necessary to cite the "future legislation" mentioned by said proviso, viz., the act of March 3, 1891 (26 Stats., 1095), which provides by section 12 for the purchase by any citizen or association or corporation of the United States "now or hereafter in possession of and oc- "cupying public lands in Alaska *for the purpose of trade or "manufactures*"—a provision without precedent in the history of the public land law of the United States. It will be seen that the act of 1891 not only thus provided for those in possession of Alaska lands *prior* to May 17, 1884, but also to those *thereafter* in possession, and it may be gathered from this fact that the act of 1884 was also intended to embrace both such classes of persons within its provisions.

We therefore contend that the act of May 17, 1884, amounted to a contract between the United States, on the one side, and those who had then or might thereafter settle upon public lands in Alaska, upon the other. The United States was obligated to perform such contract, or if it broke the same to pay damages for the breach. When an American citizen relying upon such solemn assurances of protection, and performing upon his part all the acts necessary to bring himself within that protection, and to secure the title guaranteed by the act of Congress, has put himself in such a position that the Government's breach of its contract will change his status for the worse, it is the bounden legal, as well as moral, duty of the Government to indemnify him for his losses. Such is the case of appellant, and such is the duty of the Government in relation to it.

This contractual obligation of the Government under the act of 1884 was in many respects similar to its obligations under an Indian treaty, which have always been enforced against it by the courts. Thus in the case of United States *vs.* Carpenter (111 U. S., 347) this court held land scrip located upon lands reserved for Indians under the provisions of a treaty with an Indian tribe, and the issue of a patent therefor, are void, and that "this purpose and the stipula-"tion of the United States could not be defeated by the ac-"tion of any officers of the Land Department." This ruling was affirmed in the case of Spalding *vs.* Chandler (160 U. S., 394), wherein was held to be of no effect a presidential proclamation reserving for public purposes a tract of land which the Government had stipulated by treaty to reserve for the benefit of an Indian tribe—a case "on all fours" with the one at bar.

It will furthermore be observed that the act of May 17, 1884, *supra*, provided that "the terms under which such per-"sons (*i. e.*, occupants) shall acquire title to such lands is "reserved for *future legislation by Congress*"—*not* for future presidential proclamation or executive orders. Congress

never delegated to the President its power to reserve lands from settlement and occupation for fishery or other purposes (so far as counsel can ascertain by a diligent search through the volumes of the Statutes at Large) until after claimant had erected valuable improvements upon the lands occupied by it. Therefore claimant is entitled to the full protection of the guaranty extended by the act of 1884 aforesaid, and the case falls within the rule laid down by Judge Deady in The United States *vs.* Tichenor (8 Saw., 142, 152), viz:

> "So soon as Tichenor became a settler on the land "under the donation act *there was no longer any power* "*in the President to appropriate it for any purpose.* "It had, thereupon, become private property, and "could only be taken for public uses by the authority "of Congress, acting under the right of eminent "domain, *and upon making just compensation therefor* "(5th amend. U. S. Const.)."

It is true that the Oregon donation act of 1850, mentioned in the decision cited, is not identical with the Alaska act of 1884, but with respect to the power of the executive branch of the National Government to intrench upon and nullify their provisions they must be construed alike. Moreover, section 7 of the said act of 1884 (23 Stats., 27, 28) extended the general laws of Oregon over the district of Alaska, so far as the same were applicable and not in conflict with the provisions of that act or the laws of the United States; so that the same interpretation of similar laws would seem to be not only proper, but requisite.

Proceeding within a reasonable time in strict accord with these provisions of law, this company applied for the survey of its claims, paid the necessary costs of survey, and upon the approval of same by the surveyor general deposited the price of the land. Absolutely nothing further remained for it to do. It had made a valid location; had constructed its plant; had surveyed its claim, paid the price, and de-

pended upon the United States to issue its patent. These circumstances clearly bring the case within the principles laid down in Lytle *vs.* Arkansas, 9 How., 314.

Counsel for the United States contends that no vested right had attached, because the Commissioner had not approved the survey, but had rejected it. But why did he reject it? Not because the claim was illegal and not fully within the law. No; but simply because the President had issued an order reserving the land for fishery purposes. It was not because of any act of commission or omission upon the part of the claimant, and its rights had vested just as much as though the survey had been approved, if, as we contend, it had done everything in its power as required by law to entitle it to such approval.

The Yosemite case is no guide here. That was a case of a mere pre-emption declaratory statement of a man's intention to do something which he might never do. The law gave him no interest in the land and his filing offered him no protection. He was not by the filing itself even in the class of actual settlers.

The claimant in this case falls in that larger and more easily recognized class of claimants with something tangible. A homesteader who makes original entry, settles upon land, and improves it, cannot be disturbed under the Yosemite doctrine. Why? Because he has something tangible, and because the act of Congress under which he claims is a contract as well as a law, guaranteeing him a patent upon a fulfillment by him of its requirements.

All acts of Congress providing means of disposing of its vacant public lands are in the nature of contracts, obligating the United States to grant the individual a patent conferring the title upon him, whenever he has complied with the provisions of law in that particular case. Whenever the individual, in good faith, initiates a claim by settlement, occupation, and improvements, he thereby acquires an inchoate right, which must ripen in a perfect title, whenever he has completed his period of residence, amount of cultivation, or

other specific requirement of the law. Neither the United States nor any third party can defeat his right to acquire this title, excepting through his own failure to meet the requirements of the law. The act of 1891, providing for the entry of lands in Alaska for trade and manufacturing purposes, is closely akin to previous acts of Congress providing for the location of New Madrid certificates in Missouri, and the confirmation of donation claims in Washington and Oregon. The validity of such claims has been the subject of numerous decisions in the courts, and all of them, so far as our knowledge extends, have been to the effect of holding that by the actual use and occupation of the land, and a compliance with the requirements of the law, the parties have initiated such an inchoate claim of title that will compel the issuance of a patent by the Government, or, if patent is erroneously issued to some third party, a decree by a court of competent jurisdiction that such title is held in trust for the donation claimant.

In *Stark vs. Starr*, 6 Wall., 415, the Oregon donation act was under consideration, and after a full recital of the facts and a reference to the conflicting townsite, as such was held to validate the donation claim, the court says (p. 417):

> "Before the passage of this act the claim of the defendant, Stark, had been surveyed, and the required proof of his settlement and continued occupation and residence made, and such steps had been taken as to perfect his right to a patent. The lands embraced by his claim had then ceased to be the subject of purchase from the United States, by any persons, natural or artificial. The right to a patent once vested is treated by the Government when dealing with the public lands as equivalent to a patent issued. When, in fact, the patent does issue, it relates back to the inception of the right of the patentee, so far as it may be necessary, to cut off intervening claimants."

See also—

Garland vs. Wynne, 20 How., 6.

Lindsay vs. Hawks, 2 Black, 554.

The doctrine of relation referred to in this case is quite old with respect to disposition of the public lands, and is more specifically referred to in *Landes vs. Brandt*, 10 How., 348, 372, as follows:

> "The rule applies 'that where there are divers acts
> "'concurrent to make a conveyance, estate or other
> "'thing, the original act shall be preferred, and to
> "'this the other act shall have relation' as stated in
> "Viner's Abr., tit. Relation, 290. The doctrine of
> "relation is well illustrated in Jackson *vs.* Ramsey by
> "the supreme court of New York, 3 Cowan, 75, and
> "recognized by the supreme court of Missouri in the
> "case of *Crowley vs. Wallace*, 12 Mo., 145. Cruise on
> "Real Property, vol. 5, pp. 510, 511, lays down the
> "doctrine with great distinctness. He says, 'There
> "'is no rule better founded in law, reason and con-
> "'venience than this—that all the several parts and
> "'ceremonies necessary to complete a conveyance
> "'shall be taken together as one act and operate from
> "'the substantial part by relation.' * * * Apply-
> "ing the doctrine of relation and taking all the several
> "parts and ceremonies necessary to complete the title
> "together as one act, then the confirmation of 1811
> "and the patent of 1845 must be taken to relate to
> "the first act: *that of filing the claim in 1805.*"

So also in *Gibson vs. Choteau*, 13 Wall., 92, 100, the rule was applied thus:

> "By the doctrine of relation is meant that principle
> "by which an act done at one time is considered by
> "a fiction of law to have been done at some antece-
> "dent period. It is usually applied where several
> "proceedings are essential to complete a particular
> "transaction, such as a conveyance or deed. The
> "last proceeding which consummates the conveyance
> "is held for certain purposes to take effect by relation
> "as of the day when the first proceeding was had.
> "Thus in the present case, the patent, which was
> "issued in 1862 is said to take effect by relation at
> "the time when the survey and plat of the location,
> "made in 1818, were returned to the recorder of land

"titles under the act of Congress. At that time the
"title of the claimant to the land desired by him had
"its inception, and so far as it is necessary to protect
"his rights to the land, and the rights of parties de-
"riving their interests from him, the patent is held
"to take effect by relation as of that date."

This doctrine of relation applies fully to all proceedings before the Land Department looking to the acquisition of title under the various public land laws. None of them in and of themselves transfer the legal title of any lands from the Government to the individual. All of them require something from the individual claimant, either in the way of a location, identifying the land granted a claimant; occupation, indicating the *bona fide* purpose of the claimant to establish a home; the actual selection by a State or railroad company to identify the tract enuring to it under its grant, or, in the case now under consideration, the establishment of a manufacturing plant, and the proper survey of the land embracing the same. All these acts constitute the chain of evidence leading up to the issuance of a patent divesting the United States of legal title, and in all of such cases, from the beginning of the initial act, the individual claimant acquires a right to the land selected or located which confers upon him immunity from invasion or interference by the United States or any third party, so as to prevent his further compliance with the law and the ultimate acquisition of the fee-simple title. In speaking of a railroad indemnity selection, this court in *Michigan Land and Iron Company vs. Rust*, 168 U. S., 589, 592, said:

"Generally speaking, while the legal title remains
"in the United States the grant is in process of ad-
"ministration and the land is subject to the jurisdic-
"tion of the Land Department of the Government.
"It is true a patent is not always necessary for the
"transfer of the legal title. Sometimes an act of Con-
"gress will pass the fee. * * * Sometimes a cer-
"tification of a list of lands to the grantee is declared

"to be operative to transfer such title, but whenever "the granting act specifically provides for the issue of "patent, then the rule is that the legal title remains "in the Government until the issue of the patent, and "while so remaining the grant is in process of ad- "ministration and the jurisdiction of the Land De- "partment is not lost. *It is of course, not pretended, "that when an equitable title has passed, the Land Depart- "ment has power to arbitrarily destroy that equitable "title.*"

Following this same line of thought the Secretary of the Interior, in Hastings and Dakota Ry. Co., 18 L. D., 511, 518, held:

"It is true that while the title to the lands within "the primary limits passed to the company upon the "definite location of the line of road, the title to the "indemnity lands does not pass and is not vested in "the beneficiary until a selection is made, and that "selection is approved by the Secretary of the Interior "(Wis. *vs.* Price Co., 133 U. S., 496). But the vesting "of the title to particular lands is entirely different "from the 'right' to initiate proceedings which will "ultimately ripen by approval into a perfect and com- "plete title. This 'right to select' is recognized in "the Kansas Pacific case, 112 U. S., 421, and other "decisions of that court, as well as in many decisions "of this Department; and in the Cedar Rapids case, "110 U. S., 39, it is said that this 'right' accrues when "the map of the entire line is filed, that is, the lands "in place being then capable of identification, and "the lost lands ascertainable, coincidently therewith "the 'right' to select arises and becomes fixed in the "grantee company, though the title to the selected "lands do not vest until after approval, if there be "any to select. Unquestionably it is a 'right,' and a "valuable property right, such a right as might be "sold or encumbered (Myers *vs.* Croft, 13 Wall., 291) "as has been frequently done by grantee companies, "and would entitle the assignees to the indemnity "lands when title thereto is perfected under the grant, "in accordance with its directions. Such a right is, to

" my mind, as a *chose in action*, part of the *assets* of the " corporation in question, and would be administered " by a court of equity in the interest of the creditors " and stockholders, the court appointing a trustee, if " necessary, to secure possession and control of these " assets."

See also Hagen *vs.* Northern Pacific, 26 L. D., 312.

All of these authorities and many others referred to in the decisions cited are to the effect that when a claimant initiates a *bona fide* claim to vacant public land of the United States he thereby acquires a right to perfect his title under the law and regulations, and that, upon a full compliance by him with such law and regulations, he acquires a vested interest entitling him to the issuance of a patent, and that being entitled to a patent, it is the same in the eye of the law as though patent had actually issued.

" When a tract of land shall have once been legally " appropriated for any purpose, from that moment the " land thus appropriated becomes severed from the " mass of public land, and no subsequent law or " proclamation or sale would be construed to embrace " it or operate upon it, although no reservation were " made of it."

Wilcox *vs.* Jackson, 13 Pet., 498–513.
L. L. & G. *vs.* U. S., 92 U. S., 733.
Newhall *vs.* Sanger, 92 U. S., 761–'3.

It would be just as reasonable to hold that a patent alone can confer rights as to allow the claim of the Government in this case. Aside from the pre-emption law dealt with in the Yosemite case, every act of Congress providing for the issuance of patents to claimants of its vacant lands guarantees those claimants a patent upon compliance with the law, and the laws would be a farce if, after such compliance, the United States could, through its Executive, withdraw the land from rights which had already attached. Even mere

settlement without entry is protected under all late legislation such as forest-reservation acts, etc.

Cornelius *vs.* Kessel, 128 U. S., 456–461, held:

> "The power of supervision and correction is not "an unlimited or an arbitrary power. It can be exerted only when the entry was made upon false testimony or without authority of law. It cannot be "exercised so as to deprive any person of land lawfully entered and paid for. By such entry and payment the purchaser secures a vested interest in the "property and the right to a patent therefor, and can "no more be deprived of it by order of the Commissioner than he can be deprived by such order "of any other lawfully acquired property. Any attempted deprivation in that way of such interest "will be corrected whenever the matter is presented "so the judiciary can act upon it."
>
> See also Brown *vs.* Hitchcock, 173 U. S., 478.

It is contrary to the most elementary principles of public-land law to say that patent alone can divest the United States of the power of disposing of land, and it is equally erroneous to say that no reciprocal obligation exists unless the United States can force the individual claimant to complete his claim by actual payment for the land. Every act of Congress authorizing settlement upon or entry of its vacant public lands holds out the obligation of the Government to grant the patent. The actual settlement, the occupation and improvement of the land, are the material factors, and rights are thereby acquired which the United States cannot and will not repudiate.

In *Osborn vs. United States*, 33 Court of Claims, 304, 306, after referring to the various acts of Congress providing for the disposing of its vacant lands, the court holds:

> "This act authorizes and invites the pre-emption of "*all lands* belonging to the public domain to which "the Indian title has been extinguished, whether surveyed or unsurveyed. And when a party has oc-

"cupied and improved unsurveyed public lands he
"has the right, under said act, of exercising the priv-
"ilege of claiming said land by pre-emption for the
"period of six months after it shall have been sur-
"veyed. This act does not make it unlawful, or a
"trespass, to occupy and improve such unsurveyed
"land, but authorizes such occupancy and improve-
"ment, and upon the occupant doing this he is of-
"fered the privilege not only of permanently retain-
"ing the possession of said land, but of acquiring an
"absolute title to the land itself upon paying a small
"nominal consideration therefor."

This, however, is an academic question so far as this case is concerned, because the testimony shows a complete compliance with the terms of the act of March 3, 1891, down to and including the purchase price of the land.

The general circular issued by the Department of the Interior June 3, 1891, promulgating regulations under the act of March 3, 1891, on page 3 provides:

"If, upon examination, the application shall be ap-
"proved by the *ex-officio* surveyor general, he will
"furnish the applicants two separate estimates,
"one for the field work, and one for the office work,
"the latter to include clerk hire and the necessary
"stationery. The surveyor general will be careful
"to estimate adequate sums in order to avoid the
"necessity for additional deposits."

"Upon receiving such estimates, applicants may de-
"posit in a proper U. S. depository, to the credit of
"the Treasurer of the United States, on account of
"surveying the public lands in Alaska, and expenses
"incident thereto, the sums so estimated as the total
"cost of the survey including field and office work."

* * * * * * *

"The triplicate certificate of deposit will be receiv-
"able in payment to the extent of the amount of such
"certificate, for the land purchased, the surveying of
"which is paid for out of such deposit, as provided in
"section 2403 of the Revised Statutes."

The deposit thus made, being in excess of the purchase price of the land, was a complete compliance by the claimant with each and every requirement of the law, and brings it well within the decisions cited *supra*.

For these reasons we respectfully submit that this company, having met the requirement of the law, was legally entitled to a fulfillment by the United States of its agreement, and just so far as the reservation of the land has prevented such contract from being fulfilled, so far the United States is liable and should pay.

Respectfully submitted.

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Counsel for Appellants.

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JAMES H. MCKENNEY,
Clerk.

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In the Supreme Court of the United States.

OCTOBER TERM, 1905.

THE RUSSIAN-AMERICAN PACKING COMPANY
v.
THE UNITED STATES.

No. 85.

THE ROYAL PACKING COMPANY
v.
THE UNITED STATES.

No. 86.

APPEALS FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

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APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

In the year 1889 the appellant, The Russian-American Packing Company, was incorporated under the laws of the State of California for the purpose of conducting the business of canning and packing salmon on the island of Afognak, in the Territory of Alaska.

For this purpose, in the spring of that year, the company took possession of a suitable site upon said island, comprising about 159.52 acres of vacant, unoccupied

public land, erected and installed thereon its cannery, buildings, and other plant, and proceeded to carry on the business for which it had been incorporated.

Three years later—on April 1, 1892—it made application to the United States marshal and *ex officio* surveyor-general of Alaska, under the provisions of an act of Congress approved March 3, 1891, for the survey of the land thus selected and occupied by it, and, in response to a notification from that officer, deposited in the United States subtreasury at San Francisco, as required by said act, the sum of $433.80, being the estimated cost of such survey. Thereupon the *ex officio* surveyor-general caused a survey of the ground so entered upon to be made.

Prior to the approval of this survey by the *ex officio* surveyor-general, the President of the United States, on December 24, 1892, issued a proclamation declaring the whole island of Afognak, including the site occupied and improved by the appellant, reserved from occupation and sale for the purpose of establishing thereon United States fish-culture stations, and warning all persons to depart therefrom. (27 Stats., p. 1052.)

Subsequent to this proclamation by the President, on March 15, 1893, the survey previously authorized by the *ex officio* surveyor-general of Alaska was approved and forwarded by that officer to the Commissioner of the General Land Office for approval, in conformity with the terms of the statute.

In July, 1898, the agents of the United States for the protection of salmon fisheries officially informed

the agents of the appellant on said island of the proclamation by the President, and ordered the appellant to depart therefrom, which it did, abandoning its property thereon, and has not since returned nor attempted to remove its property from said island, nor has objection ever been raised by the United States to such removal.

On January 15, 1895, the survey forwarded by the *ex officio* surveyor-general of Alaska was rejected by the Commissioner of the General Land Office for the reason that such survey did not conform to the requirements of the statute in that the tract surveyed was not in square form, and for the further reason that the whole of Afognak Island, its bays, rocks, and territorial waters, had been made a public reservation by the proclamation of the President on December 24, 1892. The marshal was directed to notify the parties in interest of their right to appeal from this decision within sixty days, but no appeal was taken by the appellant.

In April, 1897, the appellant filed its petition in the Court of Claims alleging that the act of Congress approved May 17, 1884, was in the nature of a contract by the United States with appellant that it should not be disturbed in its possession and should be allowed to acquire title to said tract of land; that by reason of the breach of said contract, by the United States, the appellant had sustained the following losses:

Trade and business	$100,000.00
Plant and equipment	46,000.00
Deposit for estimated cost of survey	433.80

The item for loss of prospective business was not pressed in the Court of Claims, and, not having been included in the assignment of errors to this court, has apparently been abandoned.

The Court of Claims, in an opinion by Peelle, J. (Record, p. 7), found, as a conclusion of law, that the appellant was not entitled to recover for the value of the improvements erected by it upon the land described, nor for the loss of the profits arising from its removal from said land pursuant to the proclamation of the President, but gave judgment for the appellant in the sum of $433.80, deposited in payment of said survey. Thereupon an appeal was taken to this court.

The facts found by the Court of Claims in these two cases and the questions of law involved are the same, except that in No. 86, the case of *The Royal Packing Company* v. *The United States*, the amount claimed was $119,045.26 and the judgment entered was for $367.35. This statement and brief is intended, therefore, to apply to both cases.

ARGUMENT.

This is an action to recover the sum of $46,433.80 as damages to the appellant arising from the refusal of the United States to permit it to purchase 159.52 acres of land on Afognak Island, in the Territory of Alaska, at $2.50 per acre, upon which it had erected a plant for the purpose of canning salmon, and compelling it to remove from said island because of a proclamation by the President of the United States creating the whole of the island a public reservation.

The appellant contends that by virtue of the act of May 17, 1884 (23 Stats., 26), a contract arose whereby the appellant was given permission to enter upon and occupy said lands with the right to purchase the same from the Government upon terms to be thereafter fixed by Congress; that, having complied with the requirements of the act of March 3, 1891 (26 Stat., 1100), as far as was then possible, the appellant became entitled to have the land surveyed and a patent issued to it, and that by the withdrawal and reservation of such lands for public purposes this contract was broken, to the appellant's damage in the amount stated.

The basis for this contention is section 8 of the act of 1884 (supra), which provides:

* * * * * * *

> That the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation, or now claimed by them, but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress. * * * But nothing contained in this act shall be construed to put in force in said district the general land laws of the United States.

It will be recalled that the appellant company did not come into existence nor take possession of the lands on Afognak Island until 1889, or five years after the date of the passage of the above act.

The Court of Claims found that appellant's possession was without authority or license from the United States, other than whatever right it may have had under the act of May 17, 1884. (Record, p. 5.)

In view of this finding, it is not necessary to ascertain or determine what the rights of the appellant might have been had this company been in the actual *use and occupation* of said lands or had laid claim to the same at the time the act was passed. The question is confined to the nature of the obligation assumed by the United States toward the appellant by reason of its settlement upon this tract subsequent to May 17, 1884.

It is perfectly manifest that the section quoted did not in any manner create a contract on the part of the United States to sell land to anybody, should it, by subsequent legislation, determine not to do so. Much less did it become bound to sell to those who might settle in Alaska long after the date of its passage. The provision is a mere permission to persons theretofore occupying public lands without right, authority, or license from the United States, to remain upon them unmolested until Congress should see fit to further legislate upon the subject. This permission is restricted in express terms to Indians and other persons in possession of lands actually in use or occupation at that date.

In 1884 the Territory of Alaska was practically an unknown land. While the benefits of civil government were extended to that Territory, it was not known at that time by Congress what portions of its vast domain might in future be required by the United States for public purposes, and so Congress wisely determined not to part with title to any lands therein until after further investigation of existing conditions had afforded

a more intelligent basis for its action. Congress therefore provided in the same act by section 12—

> That the Secretary of the Interior shall select two of the officers to be appointed under this act, who, together with the governor, shall constitute a commission to examine into and report upon the condition of the Indians residing in said Territory, what lands, if any, should be reserved for their use, what provision shall be made for their education, what rights by occupation of settlers should be recognized and all other facts that may be necessary to enable Congress to determine what limitations or conditions should be imposed when the land laws of the United States shall be extended to said district; and to defray the expenses of said commission the sum of two thousand dollars is hereby appropriated out of any moneys in the Treasury not otherwise appropriated.

It is difficult to perceive how the mere fact of the entry by appellant upon these lands five years after the passage of this act created a contractual obligation under said act on the part of the United States to convey title to the same or to respond in damages for failure so to do.

The appellant relies, however, upon the language used by the District Court of Alaska in the case of *Young* v. *Goldsteen* (97 Fed. Rep., 303), where, in passing upon the act of 1884, it was said:

> It is not too broad a construction of the language used to apply it to those who, in good faith, were the first to take up, occupy, and

> improve the public lands since that date. With the absolute guaranty of possession to those in possession of lands prior to May 17, 1884, and with the laws relating to mineral lands only having been extended to Alaska, all persons had a right to expect protection from Congress if they were the first in point of time to go upon the public domain, and occupy and improve the same, even though they went there after May 17, 1884.

This dictum is wholly without foundation. To say that under this act "all persons had a right to expect protection from Congress if they were first in point of time to go upon the public domain, and occupy and improve the same, even though they went there after May 17, 1884," is not merely *broad construction*, it is plain addition. There is absolutely nothing in the act that can be tortured into an intention by Congress to invite or encourage settlement upon the public lands of Alaska. On the contrary, it is expressly declared that "nothing contained in this act shall be construed to put in force in said district the general land laws of the United States."

Moreover, in the case cited the court was passing upon the sufficiency of demurrers filed in various actions, wherein the defendant, ~~in possession~~ under a mineral claim, was sued at law under certain statutory provisions by a number of parties claiming the same land by adverse possession. The case called for nothing more than a determination of the proper form of procedure, and that was the point decided in the

case, the court merely sustaining the demurrers on the ground that the plaintiffs were in possession of the premises, and therefore suits in equity to quiet title should have been brought. So this dictum was *obiter*.

From these facts it seems plain that when the appellant in this case occupied these lands in the spring of 1889 and erected its improvements thereon it did so not only without authority or license under the act of 1884, but in the face of an express warning by Congress that nothing in the act should be construed as a promise or agreement to put in force in that district the general land laws of the United States.

II.

THE ACT OF MARCH 3, 1891.

But the appellant maintains that it is entitled to recover in this case, irrespective of the act of 1884, *supra*, by virtue of the act of March 3, 1891 (26 Stat., 1100), the pertinent provisions of which follow:

> SEC. 12. That any citizen of the United States twenty-one years of age, and any association of such citizens, and any corporation incorporated under the laws of the United States or of any State or Territory of the United States now authorized by law to hold lands in the Territories now or hereafter in possession of and occupying public lands in Alaska for the purpose of trade or manufactures, may purchase not exceeding one hundred and sixty acres, to be taken as near as practicable in a square form, of such land at two dollars and fifty cents per

acre: *Provided*, That in case more than one person, association, or corporation shall claim the same tract of land, the person, association, or corporation having the prior claim by reason of possession and continued occupation shall be entitled to purchase the same; but the entry of no person, association, or corporation shall include improvements made by or in possession of another prior to the passage of this act.

SEC. 13. That it shall be the duty of any person, association, or corporation entitled to purchase land under this act to make an application to the United States marshal, *ex officio* surveyor-general, of Alaska for an estimate of the cost of making a survey of the lands occupied by such person, association, or corporation, and the cost of the clerical work necessary to be done in the office of the said United States marshal, *ex officio* surveyor-general; and on the receipt of such estimate from the United States marshal, *ex officio* surveyor-general, the said person, association, or corporation shall deposit the amount in the United States depository, as is required by section numbered 2401, Revised Statutes, relating to deposits for surveys.

That on the receipt by the United States marshal, *ex officio* surveyor-general, of the said certificates of deposit, he shall employ a competent person to make such survey, under such rules and regulations as may be adopted by the Secretary of the Interior, who shall make his return of his field notes and maps to the office of the said United States marshal, *ex officio* surveyor-general; and the said United States

marshal, *ex officio* surveyor-general, shall cause the said field notes and plats of such survey to be examined, and, if correct, approve the same, and shall transmit certified copies of such maps and plats to the office of the Commissioner of the General Land Office.

That when said notes and plats of said survey shall have been approved by the said Commissioner of the General Land Office, he shall notify such person, association, or corporation, who shall then, within six months after such notice, pay said United States marshal, *ex officio* surveyor-general, for such land, and patent shall issue for the same.

SEC. 14. That none of the provisions of the last two preceding sections of this act shall be so construed as to warrant the sale of any lands belonging to the United States which shall contain coal or the precious metals, or any town site, or which shall be occupied by the United States for public purposes, or which shall be reserved for such purposes, or to which the natives of Alaska have prior rights by virtue of actual occupation, or which shall be selected by the United States Commissioner of Fish and Fisheries on the islands of Kadiak and Afognak for the purpose of establishing fish-culture stations. * * * and the United States reserves, and there shall be reserved in all patents issued under the provisions of the last two preceding sections the right of the United States to regulate the taking of salmon and to do all things necessary to protect and prevent the destruction of salmon in all the waters of the lands granted frequented by salmon.

SEC. 24. That the President of the United States may, from time to time, set apart and reserve, in any State or Territory having public land bearing forests, in any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations, and the President shall, by public proclamation, declare the establishment of such reservations and the limits thereof.

The authority of the President by proclamation to withdraw the whole of Afognak Island from sale and to set it apart for public purposes being especially conferred by sections 14 and 24, above quoted, the validity of his act can not be questioned. The appellant and all others were thereby expressly warned by these sections that land selected on that island might at any time be required for public purposes, and it therefore initiated its claim with full knowledge of this condition of affairs.

Appellant insists, however, that all acts of Congress providing for the disposal of vacant public lands are in the nature of contracts obligating the United States to grant the claimant a patent to the land whenever he has complied with the provisions of the law in that particular case, and that notwithstanding the notice contained in sections 14 and 24, above quoted, when it, in strict accord with the provisions of the act, applied to the *ex officio* surveyor-general for survey of the lands and deposited a sum to cover the estimated cost of such survey, said sum being greater in amount

than the total price of the land, absolutely nothing further remained to be done on its part under the act, and, therefore, the United States became bound by contract to issue the patent in the same manner as though the survey had been finally approved by the Commissioner of the General Land Office, final entry made, and the price of the land formally paid and accepted.

Thus arises the question whether the acts of the appellant in the premises created such a contract as divested the President of the authority conferred by Congress to withdraw the lands from sale.

In the Yosemite Valley case (15 Wall., 77–87) this court held, following the case of *Frisbie* v. *Whitney* (9 Wall., 187–194):

> That under the preemption laws mere occupation and improvement of any portion of the public lands of the United States, with a view to preemption, do not confer upon the settler any right in the land occupied, *as against the United States*, or impair in any respect the power of Congress to dispose of the land in any way it may deem proper, and that the power of regulation and disposition conferred upon Congress by the Constitution only ceases when all the preliminary acts prescribed by those laws for the acquisition of the title, including the payment of the price of the land, have been performed by the settler. When these prerequisites have been complied with the settler for the first time acquires a vested interest in the premises occupied by him, of which

he can not be subsequently deprived. He is then entitled to a certificate of entry from the local land officers, and ultimately to a patent for the land from the United States. Until such payment and entry the acts of Congress give to the settler only a privilege of pre-emption in case the lands are offered for sale in the usual manner; that is, the privilege to purchase them in that event in preference to others. The United States by those acts enter into no contract with the settler, and incur no obligation to anyone that the land occupied by him shall ever be put up for sale. They simply declare that in case any of their lands are thrown open for sale the privilege to purchase them in limited quantities, at fixed prices, shall be first given to parties who have settled upon and improved them. The legislation thus adopted for the benefit of settlers was not intended to deprive Congress of the power to make any other disposition of the lands before they are offered for sale, or to appropriate them to any public use.

The case of *United States* v. *Braddock* (50 Fed. Rep., 669) follows the Yosemite Valley case. It was a suit by the Government to restrain the defendant from cutting timber from a quarter section of public land. The defendant filed a crossbill, alleging that he had made application to purchase the land in question under the stone and timber act (20 Stats., p. 89), and had complied with all the statutory requirements in that respect, but upon tender of the purchase money the local land officers refused the tender and declined

to issue a certificate of entry and purchase because the land had been withdrawn from sale by Presidential proclamation, and it was held that the defendant had acquired no vested interest in the land and that the Government was entitled to withdraw it from sale.

See also 8 Opinions Attorney-General, 72; 10 id., 57, and 11 id., 462, quoted with approval in *Frisbie* v. *Whitney*, 9 Wall., 195.

The appellant endeavors to avoid the effect of these decisions by strenuously urging attention to the decision in the case of Lytle *v.* Arkansas (9 Howard, 333), which was founded upon the familiar principle that where one endeavors to do that upon which the acquisition of a right depends and is prevented by fault of the other side his right shall not be lost by his failure. But what was the right of appellant in this case? Under the decisions above quoted it was merely a right to purchase the lands in preference to others, providing a sale was made. The appellant's failure to obtain a patent was not occasioned by the fault or neglect of any officer of the United States. The claim was rejected simply because the lands sought had been withdrawn from settlement by the lawful exercise of express authority conferred by Congress and were therefore no longer open to sale.

As was said by this court in the Yosemite Valley case (supra), p. 93, in distinguishing that case from the case of *Lytle* v. *Arkansas:* (9 How. 333).

> The whole difficulty in the argument of defendant's counsel arises from his confounding

> the distinction made in all cases whenever necessary for their decision between the acquisition by the settler of a *legal right to the land* occupied by him as against the owner, the United States, and the acquisition by him of a *legal right as against other parties to be preferred in its purchase* when the United States have determined to sell. It seems to us little less than absurd to say that a settler, or any other person, by acquiring a right to be preferred in the purchase of property, providing a sale is made by the owner, thereby acquires the right to compel the owner to sell, or such an interest in the property as to deprive the owner of the power to control its disposition.

What are the facts upon which appellant relies in this case to vest in it a legal right to the land as against the United States? Merely an application to the *ex officio* surveyor-general for the survey of the lands and a deposit of money to pay the estimated cost of such survey. While it is true that the survey was actually made and the field notes and plats were approved and forwarded by the *ex officio* surveyor-general to the Commissioner of the General Land Office, yet the appellant acquired no greater legal right to the land by such act, because at that date, March 15, 1893, the power and authority of the surveyor-general had ceased to exist by virtue of the President's proclamation issued December 24, 1892, or four months prior to the date of such approval.

The appellant contends, however, that it had acquired a vested interest in the land that could not be

impaired by a subsequent withdrawal of the land from sale.

A similar contention was pressed upon this court in the case of *Rector* v. *Ashley* (6 Wall., 151), where it was said:

> But the rights of claimant are to be measured by the act of Congress, and not exclusively by what he may or may not be able to do; and if a sound construction of that act shows that he acquires no vested interest in the land until the officers of the Government have surveyed the land, and until that survey is filed in the office of the recorder and approved by him, then, as claimant's rights are created by that statute, they must be governed by its provisions, whether they be hard or lenient. It seems to us clear, from the foregoing cases, that the court intended to decide that until this was done the claimant acquired no vested right to the land; no title, legal or equitable.

To the same effect is the decision of this court in the case of *Campbell* v. *Wade* (132 U. S., 37):

> It was contended in the State courts, and the contention is renewed here, that the petitioner, by his application for a survey, had acquired a vested interest in the lands he desired to purchase which could not be impaired by their subsequent withdrawal from sale. This position is clearly untenable. The application was only one of different steps, all of which were necessary to be performed before the applicant could acquire any right against the State.
>
> * * * * *

> The adjudications are numerous where the withdrawal from sale by the Government of lands previously opened to sale has been adjudged to put an end to proceedings instituted for their acquisition. Thus, under the preemption laws of the United States, large portions of the public domain are opened to settlement and sale, and parties having the requisite qualifications are allowed to acquire the title to tracts of a specific amount by occupation and improvement and their entry at the appropriate land office and payment of the prescribed price. But it has always been held that occupation and improvement of the tracts desired, with a view to preemption, though absolutely essential for that purpose, do not confer upon the settler any right in the land occupied as against the United States which could impair in any respect the power of Congress to withdraw the land from sale for the uses of the Government, or to dispose of the same to other parties.

To sustain the theory advanced in this case the appellant seeks to show a complete compliance with every step required by the terms of the act of 1891, including the payment of the purchase price of the land. For this purpose reference is made to the general circular issued by the Commissioner of the General Land Office, with the approval of the Secretary of the Interior, promulgating regulations for the guidance of the officers charged with the administration of the act and those seeking to acquire land thereunder,

the fifth paragraph of which states (12 Land Decisions, 583–592):

> The triplicate certificate of deposit will be receivable in payment to the extent of the amount of such certificate, for the land purchased, the surveying of which is paid for out of such deposit, as provided in section 2403 of the Revised Statutes.

Section 2403 of the Revised Statutes provides:

> Where settlers make deposits in accordance with the provisions of section twenty-four hundred and (*seven*) (one) the amount so deposited shall go in part payment for their land situated in the townships, the surveying of which is paid for out of such deposit.

The deposit which was thus made being in excess of the total price of the lands, it is alleged, constituted payment of the purchase price.

This contention is wholly without merit. The deposit was made, not as payment for the land, but solely to pay, first, the estimated cost of making the survey, and, second, the estimated cost of the clerical work necessary to be done in the office of the *ex officio* surveyor-general. This was the only object of the deposit, and it was required before the *ex officio* surveyor-general was empowered to even authorize the survey to be made. It is true that where the amount thus deposited was greater than the cost of the land, the triplicate certificate might thereafter at the final stage of the proceedings be surrendered in payment of the land, but it became available for this purpose only *after* all

the other requirements had been fully complied with under the act.

Fairly analyzed, there is but one question in this case, and that is as to the legal effect of the deposit made by the appellant of the estimated cost of the survey of the tract applied for by it. For, granting the full application of the statutes of 1884 and 1891, contended for by the appellant, it is clear, even by its own contention, that it acquired no vested right in the tract in question by virtue of these statutes alone, for the law governing the acquisition of the public domain by private parties has been so unmistakably laid down by this court that the appellant is forced to recognize that its claim must fail, unless it can establish that all essential steps required upon its application to purchase the tract occupied by it have been taken, including the payment of the purchase price thereof and its receipt by the United States.

The exigencies of its case being thus evident, there is nothing left for the appellant but to contend that the sum deposited by it as the estimated cost of the survey of the tract applied for subsequently assumed the character of payment for the tract, and furthermore that such payment must be deemed to have been accepted by the United States as such payment whilst its potency is such that the United States was divested of the title to the tract and the appellant vested with the same whether the Government would have it so or not. That it was a payment operating *ex proprio vigore*, so to speak.

In other words the contention comes to this, that a deposit of money made by an applicant for the purchase of public land to meet the costs of a survey of the tract becomes, if sufficient in amount, full payment for the tract, as soon as the survey is approved by the surveyor-general, without anything further, although the law requires that the survey be also approved by the Commissioner of the General Land Office, and even though, as in this case, the approval of the surveyor-general was made several months after the withdrawal of the tract for the purpose of public reservation by the President of the United States and in ignorance of such withdrawal, and despite the fact that the Commissioner of the General Land Office refused to approve the report of the survey because of such withdrawal by the President, and also because the survey was not in square form, as required by the statute. This contention may justly be termed preposterous.

The recovery sought in this case is the value of the building and plant placed upon this land by the appellant before the passage of the act of 1891. At that time, as has been shown, the appellant was in possession and occupation of the land without the slightest authority or license from the United States, and its improvements therefore had been erected without warrant of law and were at the entire risk of the appellant. The United States decided not to sell the land and in the exercise of lawful authority reserved it for public purposes. Certainly there can be no legal obligation rest-

ing upon the United States under these circumstances to pay for such improvements. Neither can an equitable or meritorious claim be raised, since the facts show that the unauthorized occupation of these lands, prior to the act of 1891, resulted in a profit of $65,000 to appellant from business there conducted by it, and the further sum of $35,000 from the same source in the year 1892.

The United States derived no benefit whatever from the erection of these buildings. The appellant company has not attempted to sell or otherwise dispose of or to remove the buildings from this land.

We respectfully insist that the claims of the appellants are without legal foundation and without merit, and that the judgments appealed from should be affirmed.

LOUIS A. PRADT,
Assistant Attorney-General.

FREDK. DEC. FAUST,
Special Attorney.

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Supreme Court of the United States.

Nos. 85 and 86.—October Term, 1905.

Russian-American Packing Company, Appellant, vs. The United States. } Appeal from the Court of Claims.

[December 18, 1905.]

This is an appeal from a judgment of the Court of Claims, rejecting a claim of the Russian-American Packing Company for the value of certain improvements erected by it on the island of Afognak, off the coast of Alaska. The Packing Company was incorporated in 1889, under the laws of California, for the purpose of carrying on the business of packing salmon on the island of Afognak; and for that purpose purchased and shipped materials for a cannery and buildings to be used in canning salmon, and also, without authority or license from the United States, took possession of a tract of about 159.52 acres of land, and erected thereon buildings, machinery, etc., at a cost of about $45,000. Prior to this time no one had been in possession of this tract. Claimants remained in possession for four years, and until December 24, 1892, and carried on a canning business at a profit of about $100,000, about $35,000 of which was subsequent to the passage of the act of March 3, 1891.

On April 1, 1892, claimant applied to the Surveyor General for a survey of the tract, under the act of 1891, and deposited in the Subtreasury at San Francisco $433.80, as the estimated cost of such survey. The survey was made, was approved March 15, 1893, and forwarded to the Commissioner of the General Land Office. Prior to December 24, 1892, the tract so occupied had not been reserved by the United States for fish culture, or any other purpose; nor had the same been purchased or applied for by any other person. On that day the President issued a proclamation declaring the whole island reserved for the purpose of establishing thereon a United States fish culture station, and warned all persons to depart therefrom. In July, 1893, claimant was informed of this proclamation by agents of the Government, and ordered to leave the island, which it did, and has not returned thereto. On January 15, 1895, the Commissioner of the General Land Office, in passing upon the survey transmitted to him, addressed a letter to the Surveyor General, calling attention to the President's proclamation, and rejected the survey on that ground, as well as upon the ground that the survey was not in square form, as required by statute. No appeal was taken from his decision.

The Court found as a conclusion of law that claimant was not entitled to recompense for the value of the improvements, nor for the loss of profits

arising from its removal from the island, but was entitled to recover the amount deposited for the expense of the survey.

Mr. Justice BROWN delivered the opinion of the Court.

It is well understood that the mere settlement upon public lands without taking some steps required by law to initiate the settler's right thereto, is wholly inoperative as against the United States. (*Lansdale* v. *Daniels*, 100 U. S. 113, 116; *Maddox* v. *Burnham*, 156 U. S. 544; *Northern Pacific R. R. Co.* v. *Colburn*, 164 U. S. 383.)

Petitioner, however, bases its right to recover upon certain statutes which, it is insisted, recognized the right of the petitioner to settle upon this island and make the improvements in question. The first of these is the act of May 17, 1884, "providing a civil government for Alaska," (23 Stat. 24,) wherein it was enacted by section 8 "that the Indians or other persons in said District shall not be disturbed in the possession of any lands actually in their use or their occupation, or *now* claimed by them, but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress."

It is quite clear that this section simply recognized the rights of such Indians or other persons as were in possession of lands at the time of the passage of the act, and reserved to them the power to acquire title thereto after future legislation had been enacted by Congress. As the petitioner did not take possession of this land until five years after the act of 1884 was passed, it was a mere trespasser and not in a position to avail itself of any contract which might be extorted from the language of the act in favor of the Indians or other persons who might have been in possession of the land at the passage of the act.

That this act was intended merely as a preliminary to future legislation and for the temporary protection of Indians and other settlers is made more manifest by section 12 of the same act:

"That the Secretary of the Interior shall select two of the officers to be appointed under this act, who, together with the Governor, shall constitute a commission to examine into and report upon the condition of the Indians residing in said Territory, what lands, if any, should be reserved for their use, what provision shall be made for their education, what rights by occupation of settlers should be recognized, and all other facts that may be necessary to enable Congress to determine what limitations or conditions should be imposed when the land laws of the United States shall be extended to said district."

So far from Congress intending by this act to invite a settlement upon public lands in Alaska, a contrary inference arises from a subsequent clause of section 8, that "nothing contained in this act shall be construed to put in force the general land laws of the United States."

We come now to the act of March 3, 1891, (26 Stat. 1100, section 12, of which provides:

"SEC. 12. That any citizen of the United States twenty-one years of age, and any association of such citizens, and any incorporation incorporated under the laws of the United States, or of any State or Territory of the United States, now authorized by law to hold lands in the Territories now or hereafter in possession of and occupying public lands in Alaska for the purpose of trade or manufactures, may purchase not exceeding one hundred and sixty acres, to be taken as near as practicable in a square form, of such land at two dollars and fifty cents per acre. . . ."

Section 13 provides for a survey, a deposit of the cost of such survey, a report to the Commissioner of the General Land Office, and an approval by him of the survey, and for the final issue of the patent. Section 14 of the act is important, and reads as follows:

"SEC. 14. That none of the provisions of the last two preceding sections of this act shall be so construed as to warrant the sale of any lands belonging to the United States . . . to which the natives of Alaska have prior rights by virtue of actual occupation, or which shall be selected by the United States Commissioner of Fish and Fisheries on the islands of Kadiak and Afognak for the purpose of establishing fish-culture stations, . . . and there shall be reserved in all patents issued under the provisions of the last two preceding sections the right of the United States to regulate the taking of salmon and to do all things necessary to protect and prevent the destruction of salmon in all the waters of the lands granted frequented by salmon."

Even if section 14 had not been enacted, it would not follow that petitioner, by sections 12 and 13, became entitled to a patent of the United States by procuring a survey of such lands. We have had occasion in several cases to hold that, although the occupation and cultivation of public lands with a view to pre-emption confers a preference over others in the purchase of such lands by the *bona fide* settler, which will enable him to protect his possession against other individuals, it does not confer a vested right as against the United States in the land so occupied. Such a vested right, under the pre-emption laws, is only obtained when the purchase money has been paid, and receipt from the proper land officer given to the purchaser. Until this has been done it is competent for Congress to withdraw the land from entry and sale, though this may defeat the inchoate right of the settler. (*Frisbie* v. *Whitney*, 9 Wall. 187.) When this payment is made, the other prerequisites having been complied with, the settler is then entitled to a certificate of entry from the local Land Office and ultimately to a patent. (*The Yosemite Valley Case*, 15 Wall. 77, 87; *Campbell* v. *Wade*, 132 U. S. 38; *Shiver* v. *United States*, 159 U. S. 491.)

The case of *Lytle* v. *Arkansas*, (9 How. 314,) is much relied upon by the petitioner, and is carefully criticised and distinguished by Mr. Justice Field in the Yosemite Valley case. In that case proofs were taken and

decided both by the Register and the Receiver of the Land Office to be sufficient, and the money was *paid* by the claimant, and received by the Commissioner; but through misconduct or neglect the Register refused afterward to permit claimant to enter the section, and it was held that the right of the pre-emptor thus acquired could not be impaired by a selection of land by a subsequent act of Congress. Commenting on this case Mr. Justice Field observed in the Yosemite Valley case (p. 93) that—

"The whole difficulty in the argument of defendant's counsel arises from his confounding the distinction made in all cases whenever necessary for their decision between the acquisition by the settler of a legal right to the land occupied by him as against the owner, the United States, and the acquisition by him of a legal right as against other parties to be preferred in its purchase when the United States have determined to sell. It seems to us little less than absurd to say that a settler, or any other person, by acquiring a right to be preferred in the purchase of property, providing a sale is made by the owner, thereby acquires the right to compel the owner to sell, or such an interest in the property as to deprive the owner of the power to control its disposition."

But if there were any doubt regarding the rights of the petitioner in connection with the above case, they are completely resolved by the language of section 14 of the act, which declares that the provisions of the preceding sections shall not be so construed as to warrant the sales of any lands belonging to the United States which shall be reserved for public purposes, or selected by the Commissioner of Fish and Fisheries on the islands of Kadiak and Afgonak, for the purposes of establishing a fish-culture station. As the President exercised the rights thus reserved, and declared the whole island appropriated for the purpose of establishing a fish-culture station, and warned all persons to depart therefrom, it is clear that the rights, if any, previously acquired by the settlement were terminated by the proclamation. Petitioner gained no additional consideration from the improvements put upon the land, since, if for no other reason, these were made prior to the act of 1891, when it was a mere trespasser and occupying the land without a shadow of title.

Affirmed.

No. 86.

Royal Packing Company
vs.
United States.
} Appeal from the Court of Claims.

Per Curiam:

This case depends upon a similar state of facts, involves the same question of law, and is also

Affirmed.